in No. 206.
APR 13 1899
JAMES H. McKENNEY,
Clerk.

No. 206

MAR 1 1899
JAMES H. McKENNEY,
Clerk.

Brief of Herron & Oldham for

SUPREME COURT OF THE UNITED STATES.

Appt. in 279

Filed Apr. 13, 1899.

OCTOBER TERM, 1898.

DAVID ARMSTRONG, Receiver of The Fidelity National Bank of Cincinnati, Ohio,
Appellant,

vs.

THE CHEMICAL NATIONAL BANK of New York.

No. 279.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR APPELLANT.

JOHN W. HERRON,
FRANCIS F. OLDHAM,
Counsel.

W. H. ANDERSON & Co., Law Publishers, Cincinnati, Ohio.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

DAVID ARMSTRONG, Receiver of The Fidelity National Bank of Cincinnati, Ohio, Appellant, vs. THE CHEMICAL NATIONAL BANK of New York.	No. 279.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR APPELLANT.

JOHN W. HERRON,
FRANCIS F. OLDHAM,
Counsel.

INDEX.

SUPREME COURT OF THE UNITED STATES.

DAVID ARMSTRONG, Receiver of The Fidelity National Bank, of Cincinnati, Ohio,
Appellant,
vs.
THE CHEMICAL NATIONAL BANK, OF NEW YORK.

No. 279.

Appeal from the United States Circuit Court of Appeals for the Sixth Circuit.

STATEMENT OF THE CASE.

On the 10th day of May, 1890, The Chemical National Bank of New York, filed its bill in equity in the Circuit Court of the United States for the Southern District of Ohio, Western Division, against the appellant, David Armstrong, Receiver of the Fidelity National Bank, of Cincinnati, to compel the allowance of a claim for $300,000 for money alleged to have been loaned by appellee to the Fidelity National Bank on the 2nd day of March, 1887. The bill alleges that the Fidelity National Bank, at the time of the loan, delivered to appellee, as collateral security, certain promissory notes

of the aggregate face value of $326.695.30, some of which were afterwards surrendered and other notes substituted therefor. A list of the notes so held by appellee after the substitution is set forth in a schedule attached to the bill, marked "Exhibit A." The bill admits that the sum of $75,000 in the aggregate had been realized by the appellee on the collaterals, which amount appellee claims to hold in lieu of the notes so paid. The prayer is, that the amount due upon the loan may be ascertained; that appellee may be decreed to be a creditor of said Fidelity National Bank in the sum so found due, and entitled to receive dividends with interest thereon from the time that dividends were paid to other creditors of said bank by the Receiver, until the dividends to be received by appellee with the proceeds of collaterals realized shall fully pay the amount of its claim. The answer of appellant, as amended, denies that the loan was made to the Fidelity National Bank, but alleges that Edward L. Harper, vice-president of the Fidelity National Bank, borrowed the money without authority from the bank, and used the same individually. The answer further alleges, as a partial defense, that, by the negligence of appellee, an indorser upon one of the notes for the sum of $25,000, received as collateral security by appellee, was discharged, and that the sum of $75,000 realized upon the collaterals had been credited by appellee on its claim. The answer claims that, if appellant is liable at all, the amount lost by the negligence of appellee and the amount realized by it on the collaterals should be first credited on the claim; also that appellee should be required first to exhaust the collaterals still held by it, and apply the proceeds on its claim, and be permitted to prove its claim only for the balance thereafter remaining due.

To the answer the complainant filed a general replication. Upon trial in the Circuit Court, it was held that the claim

was a valid claim, but the Court deducted all collections made upon collaterals prior to the filing of the claim, and rendered judgment for the balance.—(50 Fed. 798.)

Both parties appealed from this decision. On hearing before the Circuit Court of Appeals, that Court reversed the decision of the Circuit Court, and not only held the claim to be a valid one, but held that it should have been allowed for the full amount, regardless of proceeds realized from the collaterals.—(59 Fed. 372.)

On a petition for rehearing, the Circuit Court of Appeals modified this decision and reversed the cause, and remanded it to the Circuit Court, with instructions to permit either party to take additional testimony upon the issue, whether the Fidelity Bank owes anything to the Chemical Bank, by virtue of the alleged loan. That if the issue be decided in favor of the Receiver, the bill should be dismissed, and a decree entered in favor of the Receiver for the restitution of the $100,000 paid by the Receiver July 25, 1892, to the Chemical National Bank on the faith of the decree below. That if the liability of the Fidelity National Bank should be established, a decree to be entered directing the Receiver to allow the claim of $305,450 (being the amount of the loan and interest until the date of the insolvency, June 21, 1887), and to pay the dividends accruing on said claim, with interest, on those declared before April 25, 1890, from that date, and on those thereafter declared from the date of declaration, etc., etc. (65 Fed. 573.) The cause was again tried upon additional evidence in the Circuit Court, which decided the issue upon the liability of the Fidelity National Bank against the Receiver, and judgment was there entered in accordance with the mandate of the Circuit Court of Appeals. (Rec., p. 266 and 76 Fed. 339.) From this decree the Receiver again appealed to the Circuit Court of Appeals, which affirmed the

decree of the Circuit Court with costs. (Rec., p. 283 and 83 Fed. 556.) The Receiver of the Fidelity National Bank filed his petition for appeal from that decree to this Court (Rec., p. 307), and the appeal was allowed by the Circuit Court of Appeals. (Rec., p. 309.)

The facts appearing by the evidence, and practically undisputed, are as follows:

On February 28, 1887, E. L. Harper, the Vice-President of the Fidelity National Bank, enclosed to the Cashier of the Chemical National Bank, of New York, the Fidelity's certificate of deposit for $300,000, payable to the order of E. L. Harper, and also a large amount of bills receivable as collateral to the certificate, and requested the Chemical to place the amount to "our" credit and advise the rate. Copies of this letter and of the certificate of deposit, and a list of the collaterals sent with it, appear on pp. 17-19 of the printed record. The answer of the Chemical, dated March 2, 1887 (Rec., p. 29), advises the Fidelity of the receipt of letter of February 28, and that the Chemical had credited the Fidelity $300,000.

The letter of E. L. Harper of February 28, 1887, was not copied into the letter-book of the bank (Rec., p. 65, Q. 32, 33), and there is no evidence that any other officer of the bank knew of its existence. At the time E. L. Harper did not have $300,000 to his credit in the bank, and he had not deposited that sum, or any part of it, as the basis of such a certificate. The certificate itself did not appear on the books of the bank. It was not written on a blank certificate of deposit, taken from the usual place in the book of certificates, either as to date or number, but it was torn out of the back of the book (Rec., p. 63, Q. 9, and p. 98) and filled in by Miss Holmes, the acting exchange clerk of the bank. What knowledge either she or the cashier had of the object of this

certificate we do not know. Miss Holmes has disappeared, and the cashier is dead, so that we have no statement from either of them as to the circumstances attending the issuing of this certificate. It was probably done by order of Harper, without any other knowledge in regard to it. The Chemical, on March 2, 1887, placed to the credit of the Fidelity $300,-000, and on the same day notified it of this credit. On the same day, by direction of E. L. Harper, entries were made on the books of the Fidelity charging this sum to the Chemical, and crediting the amount to Harper. Mr. J. H. Watters' on pages 63-65 of the printed record, explains how this was done, and gives the original tickets handed in at the time. They are Watters' Exhibits 2 and 3. (Rec., p. 98). His statement is as follows:

"Mr. Edward L. Harper, the Vice President of the Fidelity National Bank, came to my desk—the general bookkeeper's desk — and gave me a charge ticket, asking me to place it to his credit.

(Copy of charge ticket.)

CINCINNATI, 1887.

THE FIDELITY NATIONAL BANK.

Credit Check.

Transfer of funds $300,000

E. L. H.

Charge Chemical N. Y.

I think I made out the charge deposit ticket, which was given to the receiving teller, who in turn entered it on the desposit book of the Fidelity, and by the individual bookkeeper placed to the credit of Edward L. Harper. The charge ticket went to the general bookkeeper, who in turn charged a like amount to the Chemical National Bank.

This is the original deposit ticket made out by myself at the request of Mr. Edward L. Harper.

THE FIDELITY NATIONAL BANK

When city checks are desposited, name the bank on which they are drawn. When foreign checks or drafts, name the State on which they are drawn.

CINCINNATI, March 2. 1887.

Credit account of E. L. Harper . .
Currency . . . .
Coin . . . .
Checks . . . . $300,000."

This $300,000 was used by Harper for his individual purposes (Rec., p. 73, Q. 106).

There is no evidence that any officer or director of the bank knew of this alleged loan, either at the time or subsequently. There is no reference to it on the minutes of the Board of Directors. Soon after April 1, 1887, the Chemical Bank sent to the Fidelity an account current for the month of March. In that account the Fidelity is credited with March 2, 1887, Tem. loan * * * 300,000 (Rec., p. 67, Q. 48. and Watters' Exhibit No. 10, filed by stipulation of Counsel Oct. 13, 1898) This paper was filed away among the papers of the Fidelity National Bank (Rec., p. 68, Q. 49) and there is no evidence that it was ever seen by any director of the bank except Harper.

Upon the last trial of the case in the Circuit Court, testimony was taken tending to show the custom of banks in borrowing without authority from the Board of Directors, the transmission of reconcilement sheets between the Chemical and Fidelity banks after the transaction of March 2, 1887,

and a general authority claimed by appellee to have been vested in Harper by the method, or want of method, in the management of the Fidelity's affairs by its Board of Directors. There is but slight conflict in the evidence, and its legal effect will be considered in the argument.

SPECIFICATION OF ERRORS.

The errors assigned are, first, that the Circuit Court and Circuit Court of Appeals erred in finding that The Fidelity National Bank of Cincinnati, Ohio, was liable to the Chemical National Bank of New York, for the $300,000, or any part thereof, claimed to have been loaned by The Chemical National Bank on the 2nd day of March, 1887.

Second, that the said courts erred in finding that collections, made from collaterals securing said alleged loan by the Chemical National Bank, prior to the declaration of dividends by the Receiver of the Fidelity National Bank, should not be deducted from the amount of such loan in determining the sum upon which dividends should be paid to the Chemical National Bank.

Third, that said courts erred in not requiring the Chemical National Bank first to exhaust its collateral security and apply the proceeds on its claim before proving it against the Receiver for dividends.

Fourth, that said courts erred in not charging the Chemical National Bank with, and deducting from its claim, the sum of $25,000, which it negligently failed to collect upon the note indorsed by John V. Lewis, and held by said bank as part of its collateral security.

Fifth, that said courts erred in finding that the Chemical National Bank should be paid interest on the several dividends

declared in favor of the creditors of the Fidelity National Bank, from April 25th, 1890, on those declared prior to that date, and from the date of declaration of the dividend on those subsequently declared.

ARGUMENT.

I

The first question presented is, whether the Chemical National Bank loaned $300,000 to the Fidelity National Bank.

We respectfully maintain that the Chemical had no right to loan that sum to The Fidelity on the application of its Vice-President unauthorized by the Board of Directors to borrow; that having undertaken to loan to an agent unauthorized to borrow, the loan was in legal effect to the agent personally, and that the Fidelity is not liable, as it neither received the money nor ratified in any way the transaction.

According to the testimony of Mr. Quinlan, Cashier of the Chemical, the transaction in question was made at the request of Mr. Harper, Vice-President of the Fidelity, in the letter of February 28, 1887, in which he says:

"Enclosed herewith we hand you for credit our certificate of deposit, No. 345, for $300,000, with bills collateral, as follows: * * * We desire to keep a large reserve with you, and we trust you will make the rate as low as you proposed some time since.

"Please place the amount to our credit and advise the rate.

"Respectfully yours,
"E. L. HARPER,
"Vice-President."
(Rec., pp. 17, 18.)

Mr. Quinlan, in his answer to this, says:

"Your favor of the 28th has been received. We credit Fidelity National Bank $300,000, and shall be considerate as to rate when the loan is paid. I presume that you are aware of the very material change of rates within the past two or three days. Loans for sixty and ninety days on stock exchange collaterals (railroad stocks and bonds), which were ruling at 4½ percent last week are now 5½ and 6 percent. I mention this to show you the present condition of the money market." (Rec., p. 29.)

Mr. Quinlan, in answer to the X-Q 160, (Rec., p. 38), says, in reference to certificates of deposit like that sent to the Chemical by Harper:

"I have run over several which we have from the banks, and they are made out in various ways; sometimes made by so and so namely, one of the officers of the bank, but not describing him as an officer, payable to the order of the Chemical National Bank; sometimes they state the Chemical National Bank has deposited so much to the order of W. J. Quinlan, Jr., Cashier; but when these certificates of deposit come, we don't criticise them closely. We virtually care nothing about it; we know their object; their object is, as I have already stated, to borrow money; but not to make it appear on the books as a loan, having the double object in view, to swell their deposits, and not to have to report a loan, and hence we don't criticise the phraseology of the certificates."

And he describes how this transaction was entered on the Chemical books, (Rec., p. 34.)

"Loan No. 1070, March 2, 1887, Fidelity National of Cincinnati $300,000. Certificate of Deposit Fidelity National Bank $300,000. Receivable $326,695.30."

In other places Mr. Quinlan speaks of this being a customary way for banks to borrow money.

Mr. Williams, the President of the Chemical, testifies, (Rec., p. 45, Q. 5.): "Mr. Quinlan and I talked it over, and finally agreed to make the loan." On page 46, Q. 21, he says, "My impression is that he (Harper) had written about a loan at a low rate of interest," and on page 48, Q. 51, "I regarded it (the certificate of deposit) as a loan in the place of a note."

This testimony shows conclusively that the transaction was not a purchase or discount of a certificate of deposit. The certificate of deposit (Rec., p. 19) was in the following form:

CINCINNATI, February 28, 1887.

E. L. Harper has deposited in this bank three hundred thousand dollars ($300,000) payable to the order of himself on return of this certificate in current funds.

AMMI BALDWIN, Cashier.

$300,000. Indorsed, "E. L. Harper."

The loan was to bear interest. The certificate bore no interest. The Chemical knew, as admitted by its President and its Cashier, that E. L. Harper had *not* deposited $300,000 in the Fidelity. He represented the Fidelity as wanting to borrow that amount, not as having it, and no one was misled by this customary and well understood misrepresentation of the Cashier. The proof of claim and petition in this case is based upon a loan of money by one bank to another.

While a temporary loan, or a loan on call, it was expected to continue for sometime. The rate of interest was discussed in the correspondence as a material item in the transaction. Mr. Harper, in his letter, "trusts that you will make the rate as low as you proposed some time since." This shows that the subject of a loan had been the subject of previous correspondence or verbal negotiation. Mr. Quinlan says in

reply, "we shall be considerate as to the rate of interest when the loan is paid," but adds that there has been a material change of rates within a few days; that the rates on sixty and ninety day loans on stock collaterals have gone up from 4½ to 5½ or 6 percent. He gives no quotations on temporary or call loans. The collaterals originally sent did not mature until sixty days to four months from that date, and as each piece approached maturity, it was returned to the Fidelity, and replaced by other paper not maturing so soon. The loan did continue without any effort to collect it from March 2 to June 20, 1887, and so far as appears, would have continued much longer, if the Fidelity had not failed. On May 21, Mr. Harper wrote that he would pay the loan July 15, if that were agreeable to the Chemical, and would at once pay the interest up to that date, and so far as appears this arrangement was concurred in by the Chemical. It was, therefore, clearly a loan which was expected on both sides to run for some time.

What then is the law governing the question as to the validity of a loan made to the officers of a national bank without the authority of the board of directors?

A recent case decided by this Honorable Court is full and conclusive on the subject.

Western National Bank of New York vs. Armstrong, 152 U. S. 346.

The facts in that case are substantially similar to those in the present case and are briefly as follows. By letter of date May 16th, 1887, signed by E. L. Harper without any official designation, he requested the New York bank to make a loan of $200,000 and to place the amount to the credit of the Fidelity Bank. Four notes, made by one A. P. Gahr to E. L. Harper and indorsed by him, together with certificates for

1600 shares of the capital stock of the Fidelity Bank, were inclosed in the letter. The $200,000 was placed to the credit of the Fidelity on the books of the New York bank and was drawn out partly by Hopkins the assistant cashier, and partly by Harper himself, by drafts in the name of the Fidelity Bank but did not in fact come into the actual use and possession of the Fidelity Bank otherwise than by being deposited to its credit in the New York Bank and by being checked out by drafts signed by the proper officers in the same manner as other deposits are usually drawn out. It was claimed on the part of the New York Bank that the loan was in fact, as their officers understood it to be, a loan to the Fidelity and suit was brought in equity against Armstrong, Receiver, on that theory. For the Fidelity it was claimed that the loan was to E. L. Harper personally, and that the transaction was a discount of the Gahr notes.

Mr. Justice Shiras, pronouncing the opinion of the court, says:

"There are other features of the correspondence that are pointed to by the parties as making for their respective contentions. It may be conceded that the New York Bank acted upon the theory that the loan was to the Ohio bank, and took the notes and certificates of stock as collateral. But the liability of the Ohio bank is not a necessary consequence of such a concession. It has further to be shown that the Ohio bank was really a party to the transaction, either by having authorized Harper to effect the loan on its behalf, or by having ratified his action, and having accepted and enjoyed the proceeds of the discount."

"There is no evidence whatever that the Board of Directors of the Fidelity National Bank gave any authority to Harper to borrow money on behalf of the bank, much less to borrow so enormous a sum for so long a time."

"The most that can be claimed in this case, is that Harper acted as the principal executive officer of the bank. It

can not be pretended that as such he had power without authority from the Board to bind the bank by borrowing $200,000 at four months time."

"It might even be questioned if such a transaction would be within the power of the Board of Directors."

"Nor do we doubt that a bank in certain circumstances may become a temporary borrower of money. Yet such transaction would be so much out of the course of ordinary and legitimate banking, as to require those making the loan to see to it that the officer or agent acting for the bank had special authority to borrow money. Even, therefore, if it be conceded that it was within the power of the Board of Directors of the Fidelity National Bank to borrow $200,000 on time, it is yet obvious that the Vice-President, however general his powers, could not exercise such a power unless specifically authorized so to do, and it is equally obvious that persons dealing with the bank are presumed to know the extent of the general powers of the officers."

"Without pursuing this part of the subject further, we think it evident that Harper had no authority to borrow the money, and that the bank can not be held for his engagements, even if made in behalf of the bank, unless ratification on the part of the bank be shown. It is scarcely necessary to say that a ratification to be efficacious, must be made by a party who had power to do the act in the first place; that is in the present case, the Board of Directors; and that it must be made with knowledge of the material facts. There is not the slightest evidence shown in this record, that the Board of the Fidelity National Bank, by any act formal or informal, undertook to ratify Harper's action in the premises, or that they ever had any knowledge of the transaction."

Can this case be distinguished from the one at bar? Not, we respectfully submit, so far as the right of E. L. Harper to bind the Fidelity without the action of its Board of Directors is involved. It is true that in the case now before the Court, Harper *assumed* to borrow on behalf of the bank. But in the case cited the Court waive the issue upon that point as

immaterial, and without deciding whether the form of the loan was that of a loan to Harper or a loan to the bank, assume for the purposes of the argument that Harper intended to borrow for the Fidelity and that the New York Bank intended to loan to the Fidelity. The whole reasoning of the Court is applicable to that hypothesis only. If the Court had found that by the terms of the contract as shown by the correspondence the loan was to Harper personally, there would have remained nothing to reason about. The conclusion of the Court is clear and distinct (italics ours) "we think it evident that Harper had no authority to borrow the money, and that the bank cannot be held for his engagements, *even if made in behalf of the bank*, unless ratification on the part of the bank be shown."

In both cases, Harper was vice-president of the bank. In neither case was there any action of the board of directors. Independently of ratification, he had the same authority in one case as in the other.

Nor does the form by which the loan was obtained constitute any legal difference in the cases. The law would do a vain thing in protecting banks against the unauthorized acts of their officers, if the officers by adopting any form, *thoroughly understood by the lender as a form*, can accomplish their unlawful purposes. Cashier Baldwin, who signed the certificate of deposit enclosed by Harper when he borrowed the $300,000, had no more authority to borrow than Harper had. The acts of both had no more validity than the acts of either alone; and as the President of The Chemical Bank (Rec., p. 45, Q. 5) and the Cashier (Rec., p. 38, X Q. 160) both knew exactly what the certificate of deposit meant, it has no legal significance in this case.

The differences in fact claimed to exist between the present case, and that of the Western National, are:

1. In the case of the Western National, the loan in question was the initial transaction between the two banks. In the present case there had been previous transactions between them. As none of these previous transactions were loans of money, we can not see how other transactions which were perfectly proper can legalize an illegal one.

2. In the case of the Western National Bank, the request for a loan by the Fidelity was not made by Harper signing his name as an officer of the bank. That is true, but the whole letter from Harper referred to the business of the bank, and the acceptance was directed to him as Vice-President. It was argued by the counsel for plaintiff that the whole correspondence and testimony proved that it was a loan to the bank. The Circuit Court did not hold that Harper did not apply for a loan for the bank, or that the answer did not propose a loan to the bank. It held that the transaction was a discount of paper not endorsed by the Fidelity, and that, therefore, it was not liable, and the decision of this court takes it for granted that Harper professed to be acting for the Fidelity, and that the Western understood him to be so acting.

3. It is claimed that in one case, it was a time loan, and in the other, a loan on call. The loan in the present case was as much a time loan as the other. Both were substantially time loans. That fact, however, makes no difference in fixing the illegality of the transaction.

4. It is claimed that there was a written obligation of the bank in one case, and not in the other. No written obligation is necessary in borrowing money. In the case of the Western, it was claimed that the loan was effected by correspondence; in the present case by correspondence, and the certificate of deposit accompanying the request for a loan.

The law governing this case seems so clearly defined by this Court, that it seems useless to take further time in citing cases to sustain it, and we submit that the facts in this record bring the present case clearly and unequivocally within the principles thus settled. This was a loan of $300,000, a larger sum than is pronounced by that opinion as "enormous," and as "beyond the authority of any officer of the bank to borrow." While termed a loan on call, it was a time loan in all its characteristics.

Being such, it was beyond the authority, if not of the Board of Directors, at least of any officer of the bank without the special authority of the Board of Directors to make. Harper had no such authority. Aside from the point that it is incumbent on the other side to prove such authority affirmatively, and that there is not a shadow of such proof, all the facts contradict the existence of such authority. The secrecy with which the thing was done is wholly inconsistent with such authority. The letter enclosing the certificate, and the one subsequently sending new collaterals, were not copied in the letter book of the bank. The collaterals, so far as they belonged to the bank, were forwarded without any entry of the fact being made on any book of the bank. The certificate of deposit was not entered on the books. The stub of the certificate of the number so sent—345—was marked cancelled, so that no such certificate would have appeared to have been issued by any one examining the books. The funds were immediately transferred to Harper, so as to give the matter the appearance of his private transaction. These and other facts of like character are wholly inconsistent with the idea that the Directors had any knowledge of the fact, or in any way authorized it. (Rec., p. 65, QQ. 25, 31, 32; p. 66, QQ. 37, 38, 39.)

There is another fact connected with the case showing

that the transaction was not in the regular course of banking business. The whole transaction was based on the certificate of deposit No. 345. This certificate was that E. L. Harper had deposited three hundred thousand dollars in the Fidelity National Bank, payable on demand to the order of himself on the return of that certificate. This was not true. He had deposited no money of the bank as a basis of the certificate. It was a fraud upon the bank to have issued it. It was not in the course of regular banking business. And this must have been known to the officers of the plaintiff bank. They did not believe that E. L. Harper had made any such deposit; or that said certificate stated the truth. Neither the President, nor the Cashier, in his testimony, claims that he believed it stated the truth; but claimed that other banks had done the same thing for the purpose of borrowing money. The President (Rec., p. 46, Q. 22) testified that he supposed the certificate belonged to the bank. If properly issued, it could only have belonged to the bank by being paid, and if paid it was of no use to any one else. He further says that he supposed it represented a loan. It seems a waste of words to argue that no such presumption was possible from the papers. The Cashier's testimony, on pages 38 and 39 is equally unsatisfactory. If the officers of the bank knew that this certificate stated an untruth, and that it was so issued merely for the purpose of borrowing money, it must be charged with notice of the subsequent use of the money obtained by the use of this paper.

It is claimed on behalf of the Chemical National Bank that the testimony does not show affirmatively that Harper had not, on deposit to his credit in the Fidelity, $300,000, at the date of the certificate, and the court is asked to presume that the certificate was what it purported to be. In the face of the testimony above cited, such a presumption would be a

violent one. As the officers of the Chemical knew that the Cashier issued that certificate merely for the purpose of borrowing money, to presume that the $300,000 was in the bank would be a more violent presumption in favor of the Cashier's authority than to presume action by the board of directors. Such presumptions are not indulged in favor of acts beyond the apparent scope of authority of the officers.

In Farmers and Merchants National Bank vs. Smith, 23 C. C. A. 80, the Circuit Court of Appeals in the Eighth Circuit held that a bank is not liable where its cashier sold a note and mortgage as a broker, and guaranteed payment as cashier. Judge Thayer says, p. 86, "But when the transaction, in which the bank is for the time being engaged, is known to the person dealing with it to be outside the legitimate sphere of its operations, no reason is perceived why a person, dealing with the cashier under such circumstances, should be allowed to indulge in any presumptions as to the cashier's authority. He is advised that, by the very nature of the transaction, all acts done and performed in relation thereto are beyond the power of the corporation, and, if he expects to hold the corporation liable on any contract or obligation entered into by the cashier, or other officers, in the course of that transaction, he should at least see to it that such contract or obligation is approved by the board of directors or other governing body."

We think, therefore, it is perfectly clear that this loan is invalid as to the Fidelity National Bank, unless it has been legally ratified, or there are such facts as will amount to a legal ratification.

The learned judge who pronounced the opinion in this cause in the Circuit Court of Appeals, held that sufficient authority was conferred upon Harper by the custom of banks

generally, in Cincinnati and New York, to permit their executive officers to borrow money on behalf of their banks, and that such custom was proven by the testimony. Also, that the conduct of the directors of the Fidelity Bank, in neglecting their business and practically permitting Harper to manage its affairs conferred upon him sufficient authority to borrow the $300,000.

We respectfully submit in the first place that the testimony does not show that any such general custom existed.

First, of the Cincinnati bankers,—

M. M. White, of the Fourth National states that he knows what is the custom of his bank,—they did not require a resolution of the board of directors of the borrowing bank to authorize the executive officer to borrow money. He, however, testifies that only on one occasion did he borrow money for his bank, and then a record of it was made in the proceedings of the Directors' meetings. (Rec., p. 145, Q. 10.) He says vice-presidents are not usually active in the management of the bank. (Rec., p. 145, Q. 12.)

Mr. Goodman says, "If they (another bank) had required a loan on their own account, we would have required a resolution of the Board of Directors." (Rec., p. 161, Q. 11.)

W. S. Rowe, of the First National, testifies that it was not customary to require a resolution of the Board of Directors, but they took the note of the bank, with municipal bonds or other good bonds as collateral. (Rec., p. 162, Q. 10.)

H. C. Yergason, of the Merchants National, testifies that they discounted bills receivable of other banks, but did not require a resolution of the board of directors of the borrowing bank. **When his bank borrowed money, he always consulted the Board of Directors and obtained their approval.** (Rec., p. 169, Q. 7.)

Mr. G. P. Griffith, of the Citizens, says it was customary

to make loans when requested by the officers of the bank; but "the institutions with which he was connected have never made a loan to a bank except when secured by securities such as county bonds, U. S. bonds or other good and sufficient securities." They never borrowed of other banks, though they have put up their government bonds and drawn against them. (Rec., p. 171, X Q. 2.)

J. D. Hearne, of the Third National, testifies that it was not customary, before the decision of the Supreme Court, to require a resolution of the board of directors of the borrowing bank before lending it money. Such loans were made by discounting the commercial paper of the borrowing bank, or direct loans; and, in the latter case, they would generally put up their bills receivable or other collateral to secure the loan. Mr. Hearne had borrowed money for his bank, and says, "we consulted with the Board of Directors when we borrowed money for the bank." (Rec., p. 175, X QQ. 2–6.)

This is all the testimony offered as to the custom in Cincinnati. We submit that it wholly fails to sustain such a custom here. There are six witnesses; three of them—White, Yergason and Hearne—had borrowed money for their respective banks. They swear that they always consulted the Board of Directors before doing so. Goodman testifies that he would not loan money to a bank, before the decision, without a resolution of the Board of Directors. The other two, Rowe and Griffith, speak of the custom and powers of the officers, but neither ever borrowed money for his bank. All testify that when such loans are made, they are made upon collaterals—upon government or other bonds, or the commercial paper of the borrowing bank. No better evidence of the doubt of these gentlemen as to the right of the banks to borrow money could be adduced. When these witnesses represented borrowing banks, they required the

authority of the board of directors; when they represented the loaning banks, they required collateral from which the debt could be realized without calling upon the responsibility of the bank itself. If the custom in Cincinnati is to prevail, as we submit is the case, the testimony offered sustains the opinion of the Supreme Court. It certainly does not show that it has been the custom for bank officers to borrow money without consulting the Board of Directors. Of all the witnesses examined, the two who are specially autocrats in their respective banks,—certainly as much so as Mr. Harper was in the Fidelity,—Mr. M. M. White and J. D. Hearne, had the approval of their boards when they borrowed money.

From New York, the witnesses on the subject of the custom are the President and Cashier of the Chemical Bank and five others—Clark, of the American Exchange; Hepburn, of the Third National; Townsend, of the Importers and Traders; Baker, of the First National; and Tappan, of the Gallatin. They all testify to the custom of officers of National banks loaning money without requiring the authority of the directors of the borrowing bank. Not one of these gentlemen ever borrowed a dollar for his bank. They are all lenders, and they never required a resolution of the board of directors to be furnished. Being lenders, they endeavor to confirm their own acts by their own testimony to sustain the loans which they made; and, even after the decision of the Supreme Court of the United States, to claim their views upon this question to be superior to that of the highest court in the land. Not one of them testified that the borrowing was done without the authority of the board of directors of the borrowing bank.

Mr. Quinlan, page 109, after testifying to the custom to make such loans, says they were usually made "on bills re-

ceivable, frequently receiving a certificate of deposit, and the receivables securing the certificate or loan; the certificate of desposit taking the place of a note, because the Comptroller of the Currency had for some years held that a national bank could not give a note, except its circulating notes."

He is then asked (Rec., p. 109):

Q. 13. "And it was to get around that decision that you adopted the plan of a certificate of deposit?"

A. "Excuse me. We didn't adopt the plan. The borrowing bank adopted the plan."

Q. 16. "You knew that the certificate of deposit was intended to represent a debt of the bank to the loaning bank?"

A. "We supposed this. We knew nothing whatever; but we supposed this, that in order to avoid re-discounts, the borrowing bank issued this certificate of deposit, which fulfilled two purposes—it increased their deposit line, which would be showing strength, and it did not appear as a rediscount or a loan."

Mr. Williams testifies (Rec., p. 115.):

Q. 11. "Why did your bank take a certificate of deposit?"

A. "A great many banks borrowing money wish to avoid the fact appearing in the statements that they are borrowing money, and a certificate of deposit appears among their liabilities as deposits. That was the reason, and is the reason why a great many banks borrow money on a certificate of deposit, secured by collaterals, rather than borrow on their own note, or on bills receivable. In that way nothing appears in their public statement showing that they are borrowing banks."

Dumont Clark testifies to the custom, and says in regard to the evidence of indebtedness, it was customary to take "Simply the paper which they had discounted with the endorsement of the bank upon its back; at other times we

would take a collateral note made by the bank; at other times a certificate of deposit made by the bank; in the last two cases collaterals would be attached to such instruments." —(Rec., p. 118, X Q. 2.)

Mr. Hepburn testifies as to the mode of making such loans:

"Loans were made upon a note—a collateral note—either time or demand, with the bills receivable of the borrowing bank as collateral, with the usual margin of twenty or twenty-five percent; also by discounting the receivables of the bank direct by placing the indorsement of the borrowing bank upon the same, and having the proceeds placed to their credit at the agreed rate of discount. Money was frequently borrowed also upon certificates of deposit upon a bank with the receivables of the bank put up as collateral for it. This was one of the forms of borrowing which was open to more or less criticism, and was made a subject of criticism by myself as supervising officer.

"The objection to borrowing upon a certificate of deposit, was that the banks borrowing money frequently reported the proceeds of their loans as deposits instead of bills payable, which, instead of evidencing their weakness by reporting bills payable, they advertised the public confidence in them by increasing the amount of their deposits." (Rec., p. 120, X QQ. 1, 2.)

Mr. Townsend testifies that such loans took the shape of the indorsement of the bank by one of its officers, with notes and rediscount of their bills occasionally, but not often certificates of deposit. (Rec., p. 130.)

Mr. Tappan says:

"In the majority of cases with us, the borrowing bank usually rediscounts paper, or puts up some security with the bank." (Rec., 133, X Q. 6.)

It will be noticed that the question put to all of these witnesses was:

Did the lending bank prior to that decision ever require proof of the authority of the officers of the borrowing bank in the shape of a resolution by the Directors, authorizing a loan?

Not one of the witnesses testifies to the bank he represented, ever borrowing money, or any knowledge of what was actually done by the officers of the borrowing bank. It may be that had the officers of the borrowing banks been called, the result might have been similar to that in Cincinnati; that they would not have assumed to borrow money without the authority of the Board of Directors. The situation at the two ends of the line was wholly different. At the lending end, collaterals were required sufficient to make the lender safe without looking to the responsibility of the bank. It held in its own hands the purse string from which it could pay itself; and it cared little whether the officers acted legally or not. But why was the question confined to the time prior to the decision of the Supreme Court? If the custom makes right, notwithstanding the decision, the right will continue as long as the custom prevails. Two of the New York witnesses are correct if the claim is valid. They testify that they have paid no attention to the decision, but act since the same as they did before. But we submit that no such custom has been proven, as can set aside the decision of the Supreme Court.

The whole testimony of the New York bankers shows a looseness in their mode of making loans—an autocratic claim of authority in the executive officers of national banks that makes the decision in the Western National Bank case timely and salutary. It is time that some limit should be placed to their powers. It is time that the Board of Directors should

be compelled to perform their duties, and manage the national banks as the law intended they should. Scarcely a failure of a national bank has occurred that has not been occasioned by the acts of the executive officers in indiscriminate loans and use of its funds, which would not have occurred if the Board of Directors had performed its duties.

We respectfully submit that such testimony can not make that legal which the highest court in the land has declared to be illegal.

The contention is, and the testimony was offered for the purpose of proving, *not* that the borrowing bank permits its officers to borrow without authority given by its Board of Directors, but that it is not customary for the lending bank to require such executive officers to *exhibit their authority*. In other words, the claim is, that the executive officers, duly authorized by the Boards of Directors to borrow, have been trusted so long and so uniformly by the lending banks without exhibiting their credentials that the lending bank has now a legal right to assume that the executive officer has been duly authorized to borrow by the Board of Directors, whenever he applies for a loan. Clearly, the custom was illegal in its inception. The first lending bank that omitted the precaution of asking for the special authority could not have recovered the loan if the authority had been wanting. How long, we respectfully ask, does it take for lending banks to extend the authority of limited agents in this manner? How are banks, that do not need any money and do not wish to borrow any, to protect themselves against this extraordinary power bestowed upon their agents by designing banks that have capital to loan in large amounts? Here was a Vice-President, not usually an active officer as the testimony shows (Rec., p. 145, Q. 12), and whose activity was entirely unknown to the Chemical bank, so far as the testimony dis-

closes, trusted without any actual authority and without being required to show any. If this theory of the law is correct we see nothing to prevent sellers by custom extending indefinitely the limited power of the agents of buyers. It is a dangerous doctrine that permits one class to establish a custom affecting the rights of an adverse class.

In view of the decision of this Court in The Western National Bank vs. Armstrong above cited, it seems idle to discuss the question further, or to consider the cases in which this authority was attempted to be sustained, or to discuss the question whether the evidence of custom given in this case is to be the basis of the special authority required by the decision and the law. It is simply placing the views of certain bank officers as to their authority above that of the Supreme Court. It is to fritter away and annul the force of that decision; to destroy the benefits which must follow that decision, by which it was intended to stop the headlong course of irresponsible officers from wrecking their banks by exercising powers not belonging to them, and bringing loss and bankruptcy upon the stockholders whom they are elected to serve. How can the evidence of officers, who according to the Supreme Court, have acted illegally, be made the means of legalizing those very illegal acts?

To show how little force should be given to this testimony, we desire to call the attention of the court to the admissions made by several of these witnesses. It will be remembered that the present loan was made upon a certificate of deposit made by the Fidelity to the order of E. L. Harper. This certificate represented that Harper had deposited in the Fidelity $300,000, which would be repaid upon the return of the certificate; that the bank had in its vaults that much money belonging to Harper, and on the faith of that document the loan was made. This paper, on its face, belonged

to Harper. Why should the bank borrow money when it had the money in its vaults? Harper might desire to cash the certificate, and he acted on the theory that it was his, and that the money loaned in this case was on his property. This would be the natural inference from the paper to one not initiated into the secrets of banking. But again custom comes in, and the same bankers testify that they regarded this as the note of the bank. It was customary to treat it as such. Why was this custom adopted? Mr. Hepburn explains it: They, instead of "evidencing their weakness by reporting bills payable, advertised the public confidence in them by increasing the amount of their deposits." In other words, by borrowing money in this way they represented to the Comptroller of the Currency, and to the public, that they had increased their money in bank, and had not increased their liabilities. This procedure was a fraud upon the department and the public, but is announced by the same witnesses as to custom as a regular and legitimate mode of banking sustained and legalized by custom.

It is time that banking should be governed by law, and not by what bank officers think their positions and powers entitle them to establish as fixed custom.

We respectfully submit that the opinion of the learned Judge in the Circuit Court of Appeals on this subject is not in accord with the claim of counsel for the Chemical Bank. While they undertook to show a custom of lending banks not to require the executive officer of the borrowing bank to exhibit his authority, the learned Judge appears to hold that the custom dispenses with the necessity of any authority from the Directors. Counsel argue that, as no authority is required to be exhibited by custom, the Chemical Bank had a right to rely on such custom and act without any exhibition of authority. Of course, in that case it would

be immaterial whether there was any authority or not. The Court argues that if the Directors could authorize the executive officer to borrow by resolution of the board, they could authorize him to borrow by acquiescing in a well-known usage. It is certainly true that authority can be conferred by acquiescence, but it is difficult to see how the Directors can by non-action ratify authority attempted to be conferred on their agent *by the party with whom he was undertaking to deal.* An agent derives his power from the principal, not from the adverse party with whom his principal is dealing.

It is next insisted that the Board of Directors, by neglecting their duties and permitting Harper to manage the affairs of the bank without supervision, delegated sufficient authority to him to render the transaction valid.

However negligent the Directors may have been in permitting Harper to usurp their authority, there is no evidence to show that the Chemical Bank at the time of the loan had any knowledge of such usurpation. It is not pretended that the Chemical in making the loan *relied upon* any apparent authority conferred by the Directors. The Directors themselves are but officers of the bank, and wronged the bank if ever they permitted Harper to do an act they should have done themselves. The bank should suffer the consequences of authority impliedly conferred upon Harper by the wrongful conduct of its Directors when innocent parties have been misled by such conduct, but why extend the punishment further? The Chemical Bank did nothing but what it would have done had the Directors always exercised the most careful supervision over its affairs. The conduct of the Directors conferred no *actual* authority on Harper especially in a matter where the personal judgment of the Directors was required.

In the case relied upon by the learned Judge in the Circuit Court of Appeals, Martin vs. Webb, 110 U. S. 7, Mr. Justice Harlan, speaking of the implied authority of a Cashier, says, "When, during a series of years, or in numerous business transactions, he has been permitted, without objection and in his official capacity, to pursue a particular course of conduct, it may be presumed, as between the bank and those who, *in good faith, deal with it upon the basis* of his authority to represent the corporation, that he has acted in conformity with instructions received from those who have the right to control its operations." (Italics ours.)

It is not claimed in the present case that the Directors specifically ratified the making of the loan, or that any one of them knew that it had been made. Nor does the plaintiff show any such conduct of the Directors from which authority to borrow this money can be implied. It is not shown that money had been borrowed by Harper, prior to this time, and with the knowledge of the Directors.

All of the present living Directors, except Harper, have been examined by one side or the other—four in all. They testify that they never heard of the loan until after the failure of the Fidelity. Messrs. Gahr, Pogue, Matthews and Kineon all testify that they had no such knowledge until after the failure, except Gahr, who heard from Harper, three or four days before the failure, that he had made loans from Eastern banks. No Director testifies that he knew or had heard of any such loans.

Mr. Hinch says that Harper dictated as to all the operations of the bank, but immediately confines that as to what should be held over as cash items, as that was all that came under his jurisdiction. Mr. Kineon testifies that Harper did everything; that he ran the whole bank; Mr. Kineon made efforts, he says, to have the loans examined, but wholly failed, and sold his stock to Harper, and stepped out. He

did object to the mode in which the business was managed, and discussed it with Mr. Swift, the President, but it was all in reference to loans of the bank funds by Harper. No question was made as to Harper borrowing money.

Mr. Alter testifies in almost identically the same manner. He testifies that he was refused access to the call loan account, and in consequence he resigned.

A. P. Gahr testifies that the stock which he held belonged to Harper, and, that so far as he knew, the transactions in the way of loans and discounts were not submitted by Harper to the Directors.

Mr. Matthews testifies that he always spoke to Harper about the business with the bank, which referred to discounts for Swift's Iron and Steel Company, and carrying checks of that Company in the drawer as cash.

Mr. Pogue testifies that possibly Harper was the managing man of the bank. Swift, the President, was there daily, except when absent on vacation. There was a Committee on Loans, and reports on loans and discounts were made to the Directors. This testimony only shows that Harper was the general manager of the bank. It shows further that the matters in which he acted without consulting the Board, and about which complaints were made, were as to the loans and discounts. These were all matters which, according to the Supreme Court, belonged to the business of banking, and about which the officers had authority. There is not a syllable of testimony from anyone that any Director knew of Harper borrowing money in the name of the bank—of permitting him to borrow money—so as to give an implied authority, as far as the Directors could do so, to borrow money.

In the case of the Western National Bank, it was testified that Harper was the Vice-President and managing officer,

and that by this the witness meant that Harper was "the general manager of the business of the bank," but this Court says, after quoting this testimony, that "it can not be pretended that as such he had power without the authority of the Board to bind the bank by borrowing $200,000 at four months' time."

There is no evidence that the Board of Directors knew at any time that Harper was borrowing money in the name of the bank, either before or after the case now before the court. There is not a fact brought to the knowledge of any one of the Directors in the testimony which should have led him to suppose that Harper was borrowing money for the bank. There was great confidence placed in him. There was a knowledge that he was making loans and doing other acts of his own will, but they were all in matters belonging to the legitimate banking business. Such knowledge can not bring home to them a suspicion even that he was engaged in acts outside his legal powers and illegitimate in banking business.

The effect of the testimony on this subject is to show that the Directors neglected their duty in not looking into the business *which Harper had a right to do*. It was not necessary for them to act in order that a loan of the bank's funds by Harper should be valid, but it was their duty to see to it that Harper did not lend the money recklessly. How a failure to supervise the business that he had a right to transact can confer upon him authority to transact business which required *their action* is not apparent. Still less apparent is it how the Chemical Bank can be justified in assuming that the Directors had delegated their authority to him when it did not even have notice that the Directors were neglecting any part of their duties.

Let us look for a moment at the authorities upon this

question, so as to know definitely what is necessary for the ratification of an unauthorized act.

Meacham on Agency, Section 129, says:

"It may, therefore, be stated as a general rule, that except in those cases where the principal intentionally assumes the responsibility without inquiry or deliberately ratifies, having all the knowledge in respect to the act which he cares to have, any ratification of an unauthorized contract, in order to be made effectual and obligatory upon the alleged principal, must be shown to have been made by him with a full knowledge of all the material facts connected with the transaction to which it relates; and especially must it appear that the existence of the contract and its nature and consideration were known to him."

"If he knows the facts, it is enough. But if the material facts were suppressed, or were unknown to him, except as the result of his intentional and deliberate act the ratification will be invalid, because founded upon mistake or fraud."

And in Section 148:

"It is a rule of quite universal application that he who would avail himself of the advantages arising from the act of another on his behalf, must also assume the responsibilities. If the principal has knowingly appropriated and enjoyed the fruits and benefits of an agent's act, he will not afterwards be heard to say that the act was unauthorized. One who voluntarily accepts the proceeds of an act done by one assuming, though without authority, to be his agent, ratifies the act, and takes it as his own with all its burdens as well as all its benefits. He may not take the benefits and reject the burdens, but he must either accept them or reject them as a whole. But here, as in other cases, it is indispensable that the principal should have the full knowledge of the material facts, or that he should intentionally have accepted the benefits without inquiry, otherwise the receipt and retention of the benefits of the unauthorized act is no ratification."

Morse on Banking, Section 101, says:

"Any act done avowedly for the bank may be adopted with full actual knowledge of the facts, so as to have the *same effect as if previously authorized by the same power which ratifies.* * * * * * *"

"If the directors or a majority of them know actually, not constructively of the contract and acquiesce, it is a ratification without any vote."

"It is a well settled rule that a ratification by the principal of the unauthorized acts of the agent, in order to be effectual, must be made with a knowledge on the part of the principal of all the material facts. And the burden is upon the party who relies upon the ratification to prove that the principal, having such knowledge acquiesced in and adopted the acts of the agent. It is not enough for him to show that the principal might have known the facts by the use of diligence."

"It is incumbent on the plaintiff to show that the directors, or at least a majority of them, knew of the contract, and its terms, and that with such knowledge they acquiesced in and adopted it."

"So where the cashier of a bank had been carrying on transactions with the bank contrary to its rules, for his own benefit, it was held that the fact of such transactions having been entered on the books of the bank, did not import knowledge on the part of the directors and consequent ratification."

Wheeler vs. *Northwestern Sleigh Co.*, 39 Fed. Rep. 347:

"Did the retention by the plaintiff of the avails of the stock amount to a ratification? The plaintiff received as avails of the stock the exact amount for which he had authorized his agent to dispose of the stock. He had no reason to suppose that any false representation had been made, or that his agent had assumed to dispose of any other prop-

erty than the stock as the consideration of the money paid by the purchasers, and received by him. Under such circumstances, the retention of the money can not be held to be a ratification by him of the unauthorized acts of the agent because it was retained without knowledge of the facts."

Smith vs. *Tracy*, 36 N. Y. 79:

"In the case before us, it is claimed that the receipt by the testator of the proceeds of an unauthorized sale, is to be deemed an adoption of a contract, made without his authority, and to which he never knowingly assented. Such a ruling would be subversive of well settled legal principles, and would open the door to illimitable frauds by brokers, factors, attorneys, and others, clothed with limited powers, and occupying strictly fiduciary relations."

Baldwin vs. *Burrows*, 47 New York, 199:

"The receipt even from an agent of money paid him on a contract, would not bind the principal to the contract, unless he knows on what account the money was received, and the terms of the contract."

"The mere fact that the proceeds of a contract made by one person in the name of another, without authority or a portion of them, have come into the hands of the latter, is not of itself sufficient to render him liable on the contract. To have that effect, the proceeds must be received not only with knowledge, but under such circumstances as to constitute a voluntary adoption of the contract. When goods are purchased by one assuming without authority to be the agent of another, if the latter knowingly received the goods so purchased as his *own property*, this will amount to a ratification of the agency. But if he denies the authority of the pretended agent to act for him, or having knowledge of his acts, and afterwards receives the goods as the property of the assumed agent in payment of a debt due from him, it will not amount to a ratification."

In *Phosphate of Lime Co.* vs. *Greene*, L. R. 7 C. P., page 55, Justice Welles says:

"If the act done be unauthorized, the law makes it absolutely void at the election of the persons on whose behalf it is done, so that he may repudiate it, or take the benefit of it, as he chooses; but it is not a relative nullity, in the sense that the person not choosing to ratify it is to perform some condition precedent, or do some act, before he declares it to be void. It comes round, therefore, to this alternative; either the defendants must establish that the directors had authority at the time, or that the company did, by their subsequent conduct, assent to and ratify the act of the directors so as to bind themselves as if there had been a previous authority."

Page 56:

"The principle by which a person on whose behalf an act is done without his authority may ratify and adopt it, is as old as any proposition known to the law. But it is subject to one condition; in order to make it binding it must either be with full knowledge of the character of the act to be adopted, or with intention to adopt it at all events and under whatever circumstances."

And in *Combs* vs. *Scott, et al.*, 12 Allen (Mass.) 493, the Court says:

"Ratification of the unauthorized acts of one who assumes to be an agent, in order to render them binding on the principal, must have been made with full knowledge of all material facts, and ignorance of such facts, whether it arises from want of inquiry by the principal and neglect to ascertain the facts, will render an alleged ratification ineffectual and void."

In *Thatcher* vs. *Pray*, 113 Mass. 291: Thatcher left a horse with one Gray for safe keeping. Gray, without authority, sold the horse to the defendant, and received for it a

check for $100. Thatcher had a claim against Gray for potatoes sold to him, and Gray forwarded to him the defendant's check which the latter had given him for the horse, to be credited to his account, and the plaintiff received the check and credited it on account of the potatoes, having no knowledge at the time that his horse had been sold.

"Held that the plaintiff's receipt and collection of the check were not a ratification of the sale, and that he had a right to appropriate the check to the extinguishment of the debt in payment of which it was given to him."

In *Bohart, Dillingham & Co.* vs. *Oberne, Hosick & Co.*, 36 Kansas, 284, it is held:

"Where an agent makes a contract outside of his actual and apparent power, and the fruits of his contract are received by his principals in ignorance of the material facts, and without any knowledge that the contract had been in their behalf or names, but were received and retained by them upon the information and understanding that the money was paid to ratify in part a liability existing against the agent, and in their favor such receipt and retention will not amount to an adoption and ratification of the unauthorized contract"

In *Schutz, and others, v. Jordan, and others*, 32 Fed. Rep. 55, decided by Justice Wheeler, the defendants, who were merchants, discovered that their superintendent was inclined to carry more goods in a certain department than was desirable, and directed him to keep down the stock; the salesmen of plaintiffs called to sell more goods in that department, and was informed of this direction, but the superintendent agreed that they might send more goods if they would not have any statements of account or dunning letters sent to the house. This scheme was communicated to the plaintiffs, who assented to it, and afterwards sent large quantities of goods to the house, which were received by the superintend-

ent, some of the bills paid by his direction, and many of the goods sold in the usual course of trade. When the defendants discovered what had been done, they laid out all the goods received from plaintiffs, in order to ascertain if any of them were goods which had not been paid for, but were unable to determine this, and the goods were then put back in stock and sold.

"Held that the defendants did not ratify the unauthorized act of the superintendent by retaining and selling the goods after discovery, and that the plaintiffs could not recover the price of them."

First National Bank of Burlingame, v. *Hanover National Bank of New York*, 66 Fed. Rep. 34: Sheldon was the President of the First National Bank, of Burlingame. At his request, the First National Bank, of Hanover, discounted his note for $5,000 under an alleged agreement that if not paid at maturity, it should be charged to the Kansas bank. The proceeds of the collection by Sheldon's direction were placed to the credit of the Kansas bank. Thereupon, Sheldon directed the proceeds to be charged to the New York bank, and credited to himself. The note not being paid, it was charged to the Kansas bank. Upon these facts the court below charged the jury as follows:

"If you find, from the evidence, that there was originally a defect of authority upon the part of the parties to this transaction, and if you further find that the defendant bank retained and enjoyed the proceeds of the transaction made by Sheldon, that would constitute acquiescence, as effectual as the most formal ratification afterwards, and the defendant, if you find that to be the case, would be estopped from resisting the demand of the plaintiff here. That is a matter for you to determine from the testimony, for upon the question of authority the testimony is conflicting, and you must determine it for yourselves."

The Circuit Court of Appeals held:

"An exception was taken to this portion of the charge on the ground that there was no evidence tending to show that the defendant bank received and had the benefit of the loan in controversy. We think this exception was well taken. We have stated the only evidence the record discloses on this subject, and from it clearly appears that the Kansas bank was used by Sheldon as a mere conduit through which to pass the proceeds of the discount from the New York bank to himself. Just as soon as he learned that the New York bank had credited the Kansas bank with this money on its books, he caused it to be charged to the Kansas bank (should be New York bank), and credited to himself on the books of the latter, and he used it. The Kansas bank neither retained nor enjoyed the proceeds of this discount; nor did it receive any interest, commission, or other benefit from the transaction. As there was no evidence that it retained or enjoyed the proceeds of this discount for the jury to consider, the instruction that such intention and enjoyment might work an estoppel of the right of the bank to question the authority of its officers to charge it with the liability in issue obviously tended to mislead the jury."

The proceeds of the loan in that case were enjoyed by the Kansas bank precisely in the same way as the proceeds of the loan in the present case by the Fidelity. It was checked out by the Kansas bank in its regular business, just as was done by the Fidelity Bank in this case.

To the same effect is the case of *State National Bank* vs. *Newton National Bank*, 66 Fed. Rep. 694, in which the Court says:

"That the proceeds were received and used by the investment company and not the Newton bank; that they were placed to the credit of the Newton bank on the books merely as a convenient mode of transmitting the same to the investment company."

Here, too, it was a question of the authority of the cashier to make the contract, and it was claimed the reception of the money by the bank was a ratification of his act.

And in the Western National Bank case, the Court says:

"The mere placing of the money in the name of the Ohio bank involved no ratification by the bank, unless it was so placed with their knowledge and assent; nor did the withdrawal of the money by drafts, drawn by Harper or by his direction in the name of the bank, constitute a receipt by the bank of such money, unless it was in point of fact received and used by the bank for its benefit."

How do these authorities apply to the present case, and what questions involved here do they settle?

1. The loan was an unauthorized one, and therefore not binding on the bank.

2. The crediting of the proceeds of the alleged loan by the Chemical on its books to the Fidelity, does not, of itself, make the latter liable.

3. Whatever acts may be claimed to amount to a ratification of the loan, must be shown to have been done by the Directors of the bank, with a full knowledge of the facts.

4. If the Fidelity was merely used as a conduit through which to pass the proceeds of the loan to Harper, and those proceeds were taken by him, there was no reception or enjoyment of the proceeds by the Fidelity.

The third ground upon which the Circuit Court of Appeals distinguishes this Case from the Western National Bank vs. Armstrong, 152 U. S. 346, is in what is claimed to be a ratification of Harper's unauthorized transaction by the Fidelity Bank, especially by not taking notice of informa-

tion on the subject of the loan conveyed by accounts transmitted to the Fidelity Bank by the Chemical.

The substance of this claim is, that the Chemical, by sending a statement of its account to the Fidelity, gave it information in regard to the loan, of which it was bound to take notice; that the monthly statement of the account for March, 1887, as it stood upon the books of the Chemical, transmitted by that bank to the Fidelity, was notice to it that Harper had undertaken to borrow $300,000 for the Fidelity, and that by acquiescing in that statement the Fidelity Bank ratified the loan.

The only knowledge claimed to have been brought home to the Fidelity of this loan, was the letter of March 2, 1887, (Rec. p. 29) and the account of April 1st, containing the credit as a "tem. loan" of the $300,000. (Watters' Exhibit, No. 10, p 1.) This account was handed to Watters, examined by him, and filed away (Rec. p. 68 Q. 49), and there is not a particle of evidence that the letter was ever seen by any Director except Harper, nor the account by any person except Watters, and probably Harper. Knowledge of these transactions by Harper is not the knowledge of the bank.

American Surety Co. vs. *Pauly*, 170 U. S. 133.

Mr. Justice Harlan, delivering the opinion of the court, says: "The presumption that the agent informed his principal of that which his duty and the interests of his principal required him to communicate does not arise where the agent acts or makes declarations not in execution of any duty that he owes to the principal, nor within any authority possessed by him, but to subserve simply his own personal ends, or to commit some fraud against the principal. In such cases the principal is not bound by the acts or declaration of the agent unless it be proved that he had at the time actual

notice of them, or, having received notice of them, failed to disavow what was assumed to be said and done in his behalf."

In the present case, Harper, possibly with the assistance of the Cashier, was engaged in fraudulent practices, and robbing the bank. His knowledge of the transaction through which he was effecting this robbery, was not the knowledge of the bank or of the Directors. The inference is that he would not inform the Directors of such transactions, and the evidence in the case shows that he did conceal everything relating to this matter from them. It is shown that the account of April 1st was never shown to the Directors. The credit on the Fidelity books, had they seen it, did not indicate a loan. How then would the sending of this account, with those two words on it, notify the Directors, who never saw it and who would not be expected to examine the accounts between the Fidelity and other banks, that Harper had borrowed $300,000 in the name of the bank. It is not enough to show that it was the duty of the Directors to have known what was in these accounts, or that they would or might have known it if they had performed their full duties. Knowledge must be brought home to them actually, and not constructively, before ratification by them will be held as against the bank. The following case is in point on this question:

Murray vs. *Nelson Lumber Co.*, 143 Mass. 251.

The Court below instructed the jury as follows:

"But all directors of a corporation are presumed to know what it is their duty to know, what they are able to know, and what they undertook to know when they accepted the responsibility of directors, and a jury have the right to suppose that the directors of a corporation have knowledge of its concerns. In the absence of direct and positive evidence of the knowledge of the directors, jurors have a right to assume

that they are doing what they are appointed to do, and that they know what they are appointed to know."

Held, that these last instructions were erroneous.

And the Court further says:

"In the case at bar, therefore, it was incumbent on the plaintiff to show that the Directors, or at least a majority of them, knew of the contract and its terms, and that with such knowledge they acquiesced in and adopted."

Is there any evidence that the directors of the Fidelity knew that this money had been borrowed by Harper for the bank?

Great stress is laid by the learned Judge who delivered the opinion in the Circuit Court of Appeals upon the fact that the account of the Fidelity Bank for March 1887, transmitted by the Chemical Bank about the 1st of April, 1887, and received by J. Harry Watters, book-keeper of the Fidelity, contained an item to the credit of the Fidelity thus: March 2, 1887, "Tem. loan $300,000."

If this were an item *against* the Fidelity there would be more force in the argument. A statement of the debit items imposes a duty upon the alleged debtor, whether a bank or an individual, to correct the item charged against him if there is anything wrong about it. A depositor knows more certainly than the bank whether the check purporting to be given by him is a forgery or not. When his account is shown him he owes a plain duty to the bank to notify it promptly of any erroneous charges. The duty of directors is to guard the interests of their bank. They owe no duty to guard the interests of persons giving *credit* to their bank. If they in fact know that another bank is lending them money of course their bank is responsible for the loan, but on what principle of law or equity are they required to know whether

another bank is loaning them money or not? Banks are not conducted on altruistic principles. It was the duty of the *Chemical* Bank, its officers or directors, to see that its funds were not loaned to an agent who had no authority to borrow. How can that duty be shifted to the officers or directors of the Fidelity so as to impose an obligation upon them to see that none of their officers *have* borrowed money without authority?

The cases cited by the Circuit Court of Appeals do not seem to us to sustain the contention that the Fidelity was bound to inspect carefully the account transmitted to it to see if it was credited with the proceeds of any loan.

Leather Manufacturers' Bank vs. Morgan, 117 U. S. 96, was the ordinary case of a depositor properly charged with a forged check on account of his failure to investigate the statement of his account sent him by the bank.

In Kissam vs. Anderson, 145 U. S. 435, relied on by the court, certain New York brokers illegally received funds of the Albion Bank by drafts drawn by its president to their order against the deposit of the Albion Bank in the Third National Bank of New York, the brokers knowing that the president was misappropriating the bank's funds in his private speculations. By the direction of the president they had made some deposits in the New York bank to the credit of the Albion bank, which they sought to have set off against the claim of the Albion bank. The question was, whether statements of account transmitted by the New York bank to the Albion bank showing these deposits to its credit by the brokers charged the Albion bank with knowledge that the deposit was made. It was held that the Albion bank was charged with notice.

Mr. Justice Brewer, in deciding this case, says:

"They (the brokers) deposited it to the credit of the

Albion Bank, and it was for the officers and directors of that bank to take care of its deposits. The rule might be different if Warner, the cashier of the Albion Bank, was the only officer authorized to draw on the Third National Bank, or charged with knowledge of the state of the account; but the president and teller had equal authority, and were equally chargeable with knowledge."

"At the least, it was a question to go to the jury whether the officers of the bank other than Warner, in the exercise of reasonable and proper care, could have ascertained that their moneys had been deposited to the account of the Albion Bank and would or would not have accepted such deposits as the return of the moneys to the bank."

The matter of the deposits of the bank belonged to the ordinary business of banking, and the officers of the bank, a part of whose duty it was to supervise deposit accounts, may well be held to notice, which will bind the bank of the state of such accounts. But to go further and hold that notice to officers or tellers in matters as to which they have no power, and in matters of not legitimate banking, and so as to affix a liability upon a bank by certain words in an account—a liability which only could be incurred by the directors themselves—and which account they never saw, and which it can scarcely be expected a director of a bank would see, is not, we submit, within the rule laid down in the above case. It is an attempt to foist, on the notice of a credit which belonged to the legitimate business of the bank, notice of a liability which it had no right to incur, and which directors had no reason to suppose was being incurred. Notice of a credit is no notice of a liability growing out of the credit. As in this case, as said by Mr. Justice Brewer, the rule might be different if Warner was the only officer—so here it is different when the Board of Directors is the only authority to incur the liability.

But let us see exactly what the notice, which it is claimed, will render the bank liable, amounts to. Appellee's attorney has laid great stress on the part that early in April, the Fidelity Bank received from the Chemical, an account current of the transactions between the banks during the previous month. A copy of this account is printed separately as Watters' Exhibit, No. 10. In that account, under the date of March 2, appears on the credit side of the account the following:

1887	Mch 2	Tem. Loan 300,000

There are in addition several copies of letters and accounts called reconcilement sheets, sent backwards and forwards between the banks. All of these except the first, are mere matters for the bookkeepers in correcting errors, and in none of them does the item in controversy appear, and we can not see that any one of them could give notice of the alleged loan to any person who might have examined them.

Watters' Exhibit, No. 10, was received in the first instance by Watters, the general bookkeeper of the bank (Rec. p. 67, Q. 48). This account was received by him checked O. K., and filed away among the papers of the Fidelity National Bank. On March 2, Mr. Watters had received from Mr. Harper the charge and deposit tickets by which this item was charged to the Chemical and credited to Harper. This was the mode by which any sum deposited in New York for Harper's account would be transferred to him, and Watters naturally supposed that to be the explanation of this transaction. When, therefore, he received the account current and saw this item, he checked it as correct, and it excited in his mind no suspicion that it was different from what the entries in the Fidelity books indicated. He testifies that in view of these entries he would infer that this loan was made

to Harper. He has no recollection, however, of noticing it at all. But was it an entry which would in the ordinary course of business have come within the knowledge of the most vigilant director of a National Bank? If not, how can it bring notice of a loan to the bank home to the Board of Directors? Would such a board, exercising the greatest possible care over the affairs of the bank, reasonably be supposed to have seen this entry on that current account? Such a vigilance might have led them to inspect the Fidelity books, but such an inspection would have shown the transaction not to have been a loan, but a deposit for Harper's benefit, and the money drawn out by him. Bearing in mind the position that the loan must have originally been authorized by the Board of Directors, or that the board, with knowledge that such a loan had been made, ratified it—the evidence furnished from this account wholly fails to sustain any such ratification.

But it is claimed that Armstrong ratified this act of Harper. Ratification is based largely on the doctrine of estoppel. How can estoppel apply as against the receiver? How did any act of his affect the rights of the plaintiff bank so that it would be unjust at this time to claim the loan to be unauthorized? He had no power to ratify an unauthorized act of an officer of the Fidelity. His sole duty was to collect the assets of the Fidelity Bank, and under the directions of the Comptroller of the Currency, allow or reject claims, pay dividends, and settle up the affairs of a bankrupt bank. Did he deceive in any way the Chemical National Bank to its injury? Did that bank part with any rights, or surrender any property or claim on the faith that the receiver did not make any defense or objection to the acts of Harper? But he did reject the claim as soon as it was presented to him. When sued in this action, he did answer that the claim was

a debt of Harper, and not of the bank. What more could he do?

It is true that he brought suit against the Directors of the bank for damages sustained by the bank through the frauds of Harper, and claimed that the Directors had been negligent in attending to their duties, and in the continued employment of Harper. This it was his duty to do. He also named the present alleged loan as one of his fraudulent acts. That suit was not to recover from Harper the amount of that loan as having been paid to him. It was for damages growing out of his fraudulent acts, and could not in any way affirm and legalize what would otherwise be illegal. A large number of his fraudulent acts were set up in that suit, and it was claimed that by them the bank had been wrecked, and the stockholders damaged by the loss of the value of their stock. The suit was for damages done to the bank by the negligence of the Directors. This suit was compromised by the payment of $450,000 by the Directors. We can see nothing in that whole case to show a ratification by the receiver, if such a thing were possible, of the illegal acts of Harper.

This damage was done to the bank whether this claim is a valid or invalid one. In either case this act was a factor in bankrupting the bank and a subject for damages against the Directors for placing Harper in the position which he occupied.

It is finally claimed that the Fidelity National received and enjoyed the proceeds of this loan, and in that way ratified the unauthorized act of Harper. It must be remembered that as a general rule, ratification is not binding, unless the party knew all the facts in the case at the time he is claimed to have ratified. If, however, he in fact received

and enjoyed the proceeds of the act, it would be unjust to permit him to disavow the act and retain the proceeds. But this receiving and enjoying the proceeds, must be a substantial and not a formal one, and it must be a reception and enjoyment of them as the proceeds of the unauthorized acts—knowing that they are the proceeds of such acts. If he receives and enjoys them without such knowledge, and disposes of them to other than his own use, or to a use which at the time he supposed he had a right to apply them, it is no ratification of the acts.

In the present case, the proceeds were credited by the Chemical to the Fidelity National Bank; on the same day that credit was transferred on the books of the Fidelity to Harper, and the amount paid to him on his checks; and when the credit in the Chemical was withdrawn, it was not withdrawn as the proceeds of a loan to the bank, but as money belonging to the bank, due to it by reason of the deposit to Harper and the checking out of that deposit. How Harper knew on that day that the credit had been given, does not appear. He may have presumed from the previous correspondence that it had been given, or he may have had telegraphic information of the fact. In fact the credit had been given on that day, and there is no doubt the entries on the Fidelity books referred to that credit, and it was the credit then made that was transferred to Harper, and checked out. The moment this sum was charged to the Chemical on the Fidelity books, it was credited to Harper. It was then drawn out by him for his own uses. The bank was no richer after than before the credit was given. It makes no difference that this was a fraudulent act on the part of Harper, or that the Chemical had no knowledge of Harper's fraud. It is immaterial why the Fidelity did not obtain the use of this money; the question is, whether it did actually as a matter

of fact obtain the use of it; or whether Harper obtained the use of it by transferring the sum to his individual account. In the case of the Western National Bank, the proceeds of the loan were deposited to the credit of the Fidelity. It was drawn out of the bank by the official drafts of the Fidelity upon blanks the same as used by it in all its business, signed by officers who confessedly had the right to sign such drafts, and paid by the Western in the faith and belief that they were the lawful drafts of the Fidelity Bank. The fraud of Harper was, in the present case, no greater; it no less bore the marks and adopted the modes of regular business transactions; it was no more carefully concealed from the Directors nor from the other end than in that case. The transfer of the funds to Harper was made in the regular mode of doing business. On March 2, 1887, Harper, the Vice-President of the Fidelity, presented to the book a piece of paper containing the words, "charge Chemical, $300,000. Credit E. L. H. $300,000, transfer of funds." The different clerks did make these entries. They charged that sum to the Chemical, and credited it to Harper, and those are the only entries on the Fidelity books of the transaction. This was no remarkable or unusual act of the vice-president of a bank. Mr. Goodman, on page 161, Mr. Rowe, on page 164, Mr. Yergason, on page 169, and Mr. Griffiths, on page 172, testify that the transfer of funds made in this manner is usual in the banking business, and that it would be the duty of the bookkeeper, on being presented with such a ticket, signed by the executive officer of the bank, to make the exact entries which were made in the present case. In the language of Mr. Rowe, "if a ticket in the form of the one used by Harper was presented by the vice-president to the bookkeeper, it would be the duty of the bookkeeper to make these entries"; and, as was remarked by another witness, if he should refuse

to do so, he would be discharged from the bank. There was nothing, therefore, unusual in this mode of transferring the funds. The effect of it was to give Harper the entire amount of the credit; to make the Fidelity the mere conduit through which the transfer was made, and when the Fidelity used the money, it was as its own, by virtue of the transfer to Harper. Harper, by that act, converted the sum to his own use. Had the loan been made to Harper individually, and the proceeds, by his direction, credited to the Fidelity by the Chemical, the same course would have been pursued, and the Fidelity would have received and enjoyed the proceeds of that loan as much as it did the proceeds of the present one. When these entries were made, the credit became the property of the Fidelity, and, in using the money, it was simply using money given to it by Harper for that purpose.

In the case of *Thatcher* vs. *Pray*, already cited, Thatcher left his horse with one Gray for safe keeping. Gray, without authority, sold the horse to Pray for one hundred dollars, and received his check for it. Gray assigned this check to Thatcher who cashed and used it; but applied the amount to the payment of another debt which Gray owed him. It was held by the Supreme Court of Massachusetts that the reception and use of the money was no ratification.

And again, Bohart, Dillingham & Co. vs. Oberne, Hosick & Co., 36 Kansas, 284, the reception and use of the money was held to be no ratification, because it was paid in part to satisfy a liability against the agent in favor of the principal. And so in First National Bank of Burlingame vs. Hanover National Bank, 66 Fed. Rep., 34, a note was discounted for the president of the bank under an alleged agreement on his part that if not paid at maturity, it should be charged to the bank. The proceeds of the loan were credited to the bank, and transferred by it to the credit of the president precisely

as was done in the present case, and the bank then checked out the proceeds of the discount in its regular business, yet the Circuit Court of Appeals held that the bank neither retained nor enjoyed the proceeds of this discount, and that there was no ratification of the unauthorized act of the president. No more than this was done by the Fidelity. The proceeds were placed to its credit by the Chemical; by transfer of funds the proceeds were credited to Harper, and then checked out of the Chemical in the regular course of business; and yet Justice Thayer says: "The bank neither retained nor enjoyed the proceeds of the discount." And in just the same manner, so far as the Western National Bank was concerned, were the proceeds of the loan in that case retained and enjoyed by the Fidelity. They were placed to its credit, and the proceeds checked out by regular drafts of the bank, signed by the proper officers, and paid by the Western National in good faith.

It is no ratification because it was used not as the proceeds of a loan made to the bank, for the Directors did not know that such a loan was made, nor did its books show such a loan, but the contrary—but was used as its own, deposited in the bank by Harper and credited, and paid to him.

It is true that the Chemical had no knowledge of the entries made on the Fidelity books, nor of the frauds of Harper. Neither did the Western National Bank know the frauds that had been committed by Harper. In both cases, however, the loan was an unauthorized one—an illegal one. It was made on the application of one who had no right "to exercise such a power," "and by one presumed to know the powers of that officer." The placing of the money to the credit of the Fidelity was the culmination of this unauthorized and illegal act, and it enabled Harper to consummate the fraud by transferring the proceeds of the alleged loan to

himself. Had not this illegal loan been made, Harper could not have fraudulently obtained this money. Had the Chemical required a resolution of the Board of Directors of the Fidelity to authorize this loan before making it, Harper would never have appropriated the money. As the illegal act of the Chemical made the fraud possible, it requires something more than the use of the money in the way in which it was used to make the bank liable. It requires knowledge of the fraud in the Directors of the bank; it requires that when they used it, they knew that it was proceeds of a loan made by the Chemical to the bank, and not as a sum credited and paid to Harper, and used as a compensation for that credit.

The authorities here cited, it seems to us, clearly establish the position that in the present case there was no such enjoyment of the proceeds of this loan as will ratify the unauthorized act of Harper.

It is claimed in argument that Harper defrauded the Fidelity, not the Chemical, and that the borrowing from the Chemical had nothing more to do with his taking $300,000 from the Fidelity, by having that amount entered to his credit, than if he had taken cash out of the vaults. We do not see how it would benefit the appellee if Harper had taken the $300,000 out of the vaults even with the express consent of the Directors if the act had been permitted on account of the credit given to the Fidelity by the Chemical.

When Harper told the bookkeeper to credit him with $300,000 and charge the same amount to the Chemical (Rec., p. 64) he was asking the true legal effect to be given to his fraudulent act. Having borrowed the money for the Fidelity without authority it was a loan to himself. If he had been in New York to receive the money and had decamped with it, the Chemical after discovering the fraud would no doubt

have changed the credit from the Fidelity's account to the individual account of Harper. At least, that is what it ought to have done. But Harper was not there. He therefore asked to have the money, which had in legal effect been loaned to him, to be credited to the Fidelity which was done. This fraudulent act against the Chemical completed enabled him to draw the money from the Fidelity. The effect was the same as if he had stolen the money from any third bank and deposited it in the Chemical with one hand, taking it out of the Fidelity with the other.

II.

The next error complained of relates to the manner of crediting the proceeds of collaterals.

Of the paper sent by Harper as collateral security for the loan, a small portion only was the property of the Fidelity Bank (Rec., p. 66, Q. 35). The residue was the property of Harper.

The bill of complaint admits that the sum of $75,000 had been realized from the notes of J. W. Wilshire, part of the collaterals which the testimony above referred to shows belonged to Harper. This amount had been paid prior to the proof of claim, as appears by the copy of proof (Rec., p. 90).

After suit was brought, but before defendant's amended answer was filed, the further sum of $20,469.29 was realized from the paper of The Champion Machine Co. and bonds, which part of the collaterals belonged to the Fidelity Bank, as shown by the above testimony. (Rec., p. 66, Q. 35, and p. 76.)

Three questions are therefore presented by the record:

First, shall the creditor be required to exhaust his collat-

eral security and credit the proceeds on his claim, or to surrender his collateral, before proving his claim?

Secondly, shall he be required at least to deduct from his claim the proceeds of collateral received before proving his claim?

Thirdly, shall the proceeds of collateral received after proof of claim, but before dividends are paid, be deducted from the amount of his claim as proved and dividends be paid on the balance only?

Before discussing generally the principles that govern the application of collaterals to claims against insolvent estates, we desire to call the Court's attention to one feature of this case that renders it specially inequitable that dividends should be paid on the entire claim.

Harper, having borrowed this money for his individual purposes, is, as between himself and the Fidelity Bank, the *principal* debtor. The $75,000 received before proof of claim was his money—the proceeds of notes that belonged to him. Now, if the bank is to be held liable on the ground of some custom established by the New York banks, or negligence in its own Directors, or some principle of estoppel, we submit that it ought to have credit for that portion of the loan repaid by the proceeds of Harper's collaterals.

The section of the statute of the United States in reference to National Banks which regulates the payment of dividends is 5236 R. S., and reads as follows:

"From time to time, after full provision has first been made for refunding to the United States any deficiency in redeeming the notes of such association, the comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction, or adjudicated in a court of competent jurisdiction, and as the proceeds of the assets of such associ-

ation are paid over to him shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held."

The provisions are that the dividends shall be "ratable" of the money paid over to the comptroller by the receiver, and shall be "on all such claims as may have been proven to his satisfaction or adjudicated in a court of competent jurisdiction." The dividends must be ratable, *i. e.*, proportionate, according as the amount of each claim is to the amount to be divided. Again, it is to be on all such *claims* as have been proven or adjudicated. It must be a claim, *i. e.*, a debt. It must be proved to the satisfaction of the comptroller; or if he rejects it, it must be adjudicated in a court of competent jurisdiction. A claim as used in the statute is synonymous with indebtedness or liability.

In the language of Chief Justice Waite, in *Waite* v. *Knox*, 111 U. S. 784.

"All creditors are to be treated alike. The claim against the bank, therefore, must necessarily be made the basis of the apportionment."

The claim must be proved to the satisfaction of the comptroller. It must be supported by affidavit that the amount is actually due, that is claimed. If rejected by the comptroller, it must be adjudicated in a court of competent jurisdiction. This can be done by a suit against the insolvent bank, if still in being.

"A receiver's decision upon the validity of a claim presented to him for a dividend is not final. A creditor may proceed against the bank in the proper State Court to have the validity of his claim judicially determined."

N. Bank of Bethel v. *Pahquioke Bank*, 14 Wall. 383.

The suit may be brought against the receiver, as in the present case, to compel the allowance of a claim; but whether it is brought against the bank itself or the receiver, the question before the Court is the same, to determine judicially the validity of the claim. The amount of the claim is as much a part of its validity as any other question in the case. How much, if anything, does the insolvent bank owe to the plaintiff in the case, is the question to be determined.

The amount of the claim is not affected by the solvency or insolvency of the bank. Suppose the Fidelity Bank had not failed, and a controversy had arisen between it and the Chemical in reference to this loan, and the Chemical Bank had brought suit against the Fidelity to recover the amount of that loan, after the former had made collections on the collaterals held by it for its security, could there be any question that it could only have recovered a judgment for the amount of the loan after crediting the payments made to it up to that time from the collections of collateral? And why? Simply because that was the amount then due. That was the claim then legally existing. The claim is no larger because the Fidelity Bank has become insolvent. The claim is still the amount actually due; that is what must be proved or allowed, or judicially adjudicated by a court of competent jurisdiction.

In re Pulsifer, 14 Fed. Rep. 247,
Justice Blodgett says, as to the amount of the claim to be allowed,

"The same rule must apply in the case as would hold if a suit at law had been brought by the bank against the bankrupt as endorser of this paper."

This decision was not based on the provisions of the Bankrupt Act.

But it is claimed that there is a fixed date when the amount due is determined, and that the amount then due remains the amount on which dividends are to be paid, whatever changes may occur, and that this date is that of the suspension of the bank.

The case of *White* v. *Knox*, 111 U. S. 784, is referred to as sustaining this position. The question before the Court in that case was as to the date to which interest on claims should be calculated. The Court held that interest should be calculated on all claims to one date, and as no new debt could be contracted after the suspension of the bank, that was a convenient date to fix for that purpose. As interest on all other claims had been calculated to that date, the plaintiff in the action pending before the Court must be governed by the same rule. The object was, as stated by Chief Justice Waite, "that all creditors might be treated alike." This was accomplished by fixing a time to which interest on all claims should be calculated. It was immaterial what time that should be, so that it was the same to all. The Court had adopted the day on which the bank suspended payment, and for the reason given above, that action was approved. To use that date for the purpose claimed in this case, would reverse the result aimed at in the decision. It would not treat all creditors alike, but permit those to whom payments were made after that time to have an advantage over those to whom payments were made before that time.

The cases of *National Bank* vs. *Colby*, 29 Wall. 609, and of *Scott* vs. *Armstrong*, 146 U. S. 409, are also cited on this point.

Those cases do name a date when certain rights become fixed. But unfortunately for the argument it is not the date claimed in this case. In the first case it is declared that all transfers by an insolvent bank, and all payments of money

made after an act of insolvency, or in contemplation thereof, with a view to a preference of one creditor over another, shall be utterly null and void. The object is stated to be to secure equality among the creditors.

In *Scott* vs. *Armstrong*, the court says that the right of the party becomes fixed as to certain matters, as of the date of the act of insolvency. This date may be some time before the closing of the bank by the comptroller.

The case of *Eastern Township Bank* vs. *Vermont National Bank*, 22 Fed. Rep. 186, was also upon the question as to the date of calculating interest. And in this case a still different date is named, that of the appointment of the receiver; showing that there is no fixed time determining the rights of the parties as to interest, only such convenient time as applies to all alike and will equalize their claims.

In those cases where the date is fixed by the statutes regulating national banks, it applies only to transfers of property or payments of money, with intent to create a preference. It has no reference to fixing a date when the amounts of claims against the bank shall be irrevocably fixed. The object is stated to be to secure equality among the creditors, and not to enable one to secure an advantage over another.

Let us illustrate the result of the claim made in this case. Suppose a creditor's claims against an insolvent bank should be founded on an endorsement of bills receivable discounted for it. At the date of the closing of the bank this paper is not due, or if due has not been paid. The claim at that time would be the full amount of the paper. Suppose afterwards the makers of the paper should pay part of it. Would the creditor still be permitted to prove and collect dividends upon the entire claim? Or, if this is not granted, suppose the claim is made up of endorsements upon a number of bills receivable, none of which were paid at the date of the

suspension of the bank, and after that date one of such bills should be paid by the maker in full. Would the creditor be permitted to still prove and collect dividends against the endorser upon the whole amount of the bills receivable unpaid at the date of the suspension? On the principle claimed by the plaintiff in this case, he could. But the fixing of a date in the cases cited, and in the statute, seems to be for the purpose of equalizing the rights of all the creditors in the assets. The claim made in this case defeats that intent.

When a creditor is required to prove his claim; to verify it to the satisfaction of the comptroller, or to adjudicate it in court, the natural conclusion is that the claim must be one then existing and for the amount existing at the date of the proving or adjudication. No other time for that purpose is named in the statute.

The argument of counsel that

"As the demand of the statute that claims should be equalized for dividend purposes as they stood at the declaration of insolvency requires the creditor to ignore temporarily all additions to the claim since that day by way of interest, so on the other hand, equal justice requires that he should be permitted to ignore temporarily all deductions from the claim since that day by way of credits," is wholly fallacious. The equalizing at a certain date in the matter of interest, is wholly a matter of convenience and takes nothing from the creditor. Were interest calculated on all claims, to the date of dividend and the assets then divided pro rata, each creditor would receive the same amount as if the interest were calculated to the date of suspension. But if the creditor is permitted to receive payments after any date without deducting them, he obtains an advantage over all other creditors.

We contend, therefore, that according to the proper construction of the national banking act a dividend is payable

only upon the amount actually due: upon the amount for which a judgment would be rendered if suit be brought against the bankrupt: that the insolvency of the bank, if it takes no rights from the creditor, adds none to his claim; and that the doctrine that a particular time is established at which all claims must be valued, applies only to matters in which all are interested alike, and not to matters such as payments on particular claims, and is established in the interest of equality among the creditors, and not to destroy equality.

The next question to be considered is whether aside from the provisions of the national banking act, the complainant is entitled to prove its original claim without reference to the payments made on that claim from collaterals collected.

It is admitted that upon this question the decisions of the courts have not been uniform. Some have held that the creditor must exhaust his collaterals, and prove only for the amount of the indebtedness after crediting the value of the collaterals. Others, that he may prove for the entire amount of his claim without reference to the collaterals held by him. The uniform course of legislation, both in England and in this country, providing for the settlement of bankrupt estates, has adopted the first of these modes of settlement. It is true that during the life or the solvency of the debtor, a creditor holding collateral may sue his debtor upon the principal debt without reference to any collateral that he may hold. Giving collateral is unquestionably not payment of the debt. This right seems to be the basis of all the decisions sustaining the claim made by the complainant in this case. It is said that death or insolvency ought not to divest a creditor of any right which he might have exercised prior thereto. No such claim is necessary to sustain the decree of the court below. It is only necessary to claim that the

same rule shall apply to an insolvent as to a solvent debtor. In the case of the latter he may be sued for the entire debt; but the creditor must use due diligence to collect the collateral, and is liable to his debtor if he fail to do so. The payment of collateral in such a case invariably reduces the amount of the debt. And after any such payment has been made no greater amount can be found due than the amount of the debt so reduced by the payments on the collateral. Must not the same rule apply to an insolvent debtor?

Again, Chief Justice Waite holds that all creditors must be treated alike. Suppose, by way of illustration, two creditors hold against an insolvent debtor a claim of one thousand dollars each. One holds collateral of the value of five hundred dollars; the other none. The first is, therefore, a secured creditor in the sum of five hundred dollars and an unsecured one in the sum of five hundred dollars. The second one is an unsecured creditor for one thousand dollars. The assets of the insolvent debtor pay a dividend of fifty per cent. The result will be on the claim made by the complainant in this case, that the first creditor will have his unsecured debt paid in full, while the second creditor will receive a dividend only.

Again, two creditors hold collateral of a like character. One receives payment from the collateral held by him the day before the bank closes. He must credit that collateral and sue for the balance. The other receives payment the day after such suspension, and yet according to the claim of appellant, he may prove for the full amount of the original claim. This is not making the creditors equal.

The whole history of legislation in reference to insolvent estates shows a universal sentiment as to the justice of the claim made by the defendant. We believe that every Bankrupt Act of Great Britain, of the United States, and of the

separate States, recognizes and adopts this principle of distribution in bankrupt estates. The fact that the rule was not only adopted, but has been continued from time to time until now, is the strongest evidence of its justice and equality among creditors that can be imagined.

Section 5075 R. S. U. S. provides as follows:

"Section 5075. When a creditor has a mortgage or bill or pledge of personal property of the bankrupt, or a lien thereon for securing the payment of a debt owing to him from the bankrupt, he shall be admitted as a creditor only for the balance of the debt after deducting the value of such property, to be ascertained by agreement between him and the assignee, or by a sale thereof, to be made in such manner as the court shall direct. Or the creditor may release or convey his claim to the assignee upon such property, and be admitted to prove his whole debt."

And similar provisions were enacted in previous statutes, and also in the Bankrupt Act of 1898. After such a recognition of the Rule it is scarcely necessary to argue as to its justice and equality to a court of the United States. It is true that the national banking act does not contain a similar provision. Indeed, it contains no details or direction as to the manner in which distribution shall be made except as quoted before. But at the date of the passage of that act, the bankrupt act was in full operation; and it would be strange indeed if Congress did not intend that the same rule should apply to all insolvent estates within its jurisdiction, whether of individual bankrupts or of insolvent national banks.

Nor is the argument of complainant's counsel as to the inconvenience of the rule sound. The rule has been in force in all the bankruptcy cases in England and this country without inconvenience or injustice to any creditor. Even if a new calculation of interest were required on the payment of each

dividend, it would be better than to do such injustice to creditors as is claimed in this case. But no such calculation of interest is necessary. All that is necessary is to re-state the claims of such creditors as have received partial payments. This is always done in the case of solvent debtors, and may with equal ease be applied to insolvent ones.

What was the duty and liability of the Chemical National Bank in reference to the collaterals sent to it by Harper? The collaterals consisted entirely of promissory notes of different parties.

Schouler of Bailments, p. 213, says:

"On this latter point" (speaking of the pledge of bills receivable as collaterals) "the rule deducible from the number of late decisions is that the pledgee of negotiable securities not only has the right, but is bound in the exercise of ordinary diligence to make presentment for collection on their maturity, and then apply the proceeds on the pledged account."

And on page 192, speaking of the duty of the holder of bills left as collateral, he says he must "Collect it, and apply the proceeds to the principal debt."

And in *Wheeler* vs. *Newbould* 16 N. Y., 398, the court, speaking of the duty of the creditor, in this case the Chemical National Bank, in reference to the collaterals held by it, says:

"It will rather presume that it was the intention of the parties to the contract that the creditor should, if he resorted to the pledge in place of the personal liability of the debtor, accept the money upon the hypothecated security as it became due and payable, and *apply it to the satisfaction of the debt.*"

There are many other authorities to the same effect. It was, therefore, the duty of the Chemical National Bank to

collect the collateral paper as it matured, and to apply whatever it received to the satisfaction *pro tanto* of the debt as security for which it was given. This duty was not changed by the insolvency of the Fidelity National Bank. Its obligation to collect and apply continued the same. The effect of payments received from collaterals remained the same. Such payments should be applied to the satisfaction of the debt afterwards, as before.

Let us now look at the decisions of the courts on this question.

Three English cases have been cited by the counsel for the complainant, and as we think they fairly state the result of English authorities, we will confine our argument to them.

They are:

Greenwood vs. *Taylor*, 1 Russ. & Myl., 185.
Mason vs. *Boggs*, 2 Myl. & Cr., 443.
Kellock's case. In re Xeres Wine Shipping Co., } Law Reports, Chy. Appeals, vol. 3, 779.

The first case sustained the entire claim as made by the appellant in this case. The second doubted the correctness of that decision, but finally failed to overrule it. The third sustains the position taken by Judge Sage, that collaterals realized before proof of claim only, should be deducted.

In *Greenwood* vs. *Taylor*, the Master of the Rolls says:

"The rule in bankruptcy must be applied here; and the mortgagee can not be permitted to prove for the full amount of his debt, but only for so much as the mortgaged estate will not extend to pay. This rule is not founded, as has been argued, upon the peculiar jurisdiction in bankruptcy, but rests upon the general principles of a court of equity in the

administration of assets. The mortgagee who has two funds as against the other specialty creditors who have but one fund, must resort first to the mortgaged security, and can claim against the common fund only what the mortgaged estate is deficient to pay."

If this case is followed, the defendant is entitled to have all payments credited on the debt whether made before or after proof of claim, and on subsequent dividends to have the debt revalued by crediting payments made since the former dividend.

In *Mason* v. *Boggs*, the Lord Chancellor remarks:

"I can not distinguish this case from *Greenwood* v. *Taylor*. But with respect to the principle of that case, it is to be observed that the mortgagee has a double security. He has the right to proceed against both and to make the most he can of both. Why he should be deprived of this right because the debtor dies, and dies insolvent, it is not very easy to see. * * * What you contend is that the creditor can not proceed to enforce his legal rights unless he gives up his security."

And on page 447:

"In equity, however, a party may come in and prove without giving up or affecting his security, except so far as the amount of his debt may be diminished by what he may receive."

This last expression would indicate that a payment would reduce the amount of the debt, and that therefore if made before proving the claim it should be deducted.

In both of these cases the creditors held mortgages securing their debts. These mortgages had not in either case been foreclosed or paid; and the sole question was as to the right of the creditors to proceed to enforce both the mortgage and the indebtedness.

The third case arose under the winding up provisions of the Company's acts of 1862. In Kellock's case, Kellock & Co. held accommodation acceptances of Bernard's Banking Company for £31,264, secured by a lien on certain vessels against which the bills were drawn. A winding up order was issued May 8, 1866, and in June, 1866, Kellock & Co. sent in their claim to the official liquidators. In 1867 they realized on part of their securities £9,916. The claim was afterwards disputed, and the hearing upon the exceptions took place after the above sum had been realized.

In the Xeres Wine Shipping Co. case, the Alliance Bank had a claim secured by a lien on wine partly in its possession, and partly in the possession of the Xeres Wine Shipping Co. The winding up order was issued in December, 1864, and on March 2, 1865, the creditor sent in its claim to the official liquidators, crediting £85 realized between the date of the winding up order, and the sending in of the claim. The case was first heard by the Vice-Chancellor, Sir A. R. Mallins, and was decided in the following language:

"The winding up is a *quasi* bankruptcy. The official liquidator takes possession of all the assets of the company. He realizes them under the 133rd section, and distributes them ratably, or *pari passu* among the creditors, but over and above the assets calls may be made on the shareholders. On these grounds I am of opinion that the rules in bankruptcy are applicable; and therefore, that every creditor having a security must realize the security and come in as a general creditor for the balance due to him after such realization. The winding up order was made in 1864, and in 1865 the bank realizes their securities, and now, in 1868, they ask me to admit them to stand as creditors for the whole amount of their original debt. Now, if the official liquidator had given them a check for the amount they realized on their security the Company would not then have thought of con-

tending that they should stand as creditors for the whole amount of their original claim, and they have no higher claim to stand for the whole amount because they realized their security instead of being paid by the official liquidator.

I must, therefore, come to the conclusion that the bank must be admitted as creditors for the balance which remains due to them after realizing the securites held by them, and for that amount only."

On appeal this decision was reversed, but in deciding the case the Court says:

"There remains the question as to the time with reference to which the amount proven is to be ascertained. And as to this there is a little more difficulty. I think, however, that the true rule is that the debt is to be taken as it stands at the time when the claim is put in. The 20th Rule of the General Order under the Act of 1863 directs an advertisement fixing a time for the creditors to send the particulars of their debts or claims to the official liquidator, and appointing a day for the adjudication thereon. The Court, therefore, is to adjudicate upon the debt or claim so sent in, and the adjudication at whatever time it may take place must be on that debt or claim, and I apprehend the only way of adjudicating on it must be to adjudicate on what was due when the debt or claim was sent in."

And Chief Justice Seldon, on page 783, says:

"If we look at the practice established by the General Order, it is entirely within the discretion of the judge to fix the time within which the creditors are to send in the particulars of their debts or claims. Of course, until that time, the debt can not be established. * * * I think, therefore, that the balance of convenience and inconvenience incline strongly to the view which my learned brother has expressed, which is, that the debt is to be taken as it stood when the creditor put in his claim."

From this decision it is clear that the sending in of the claim was the equivalent to proving the claim under the national banking act. The winding up order was the date when the assets were taken possession of by the official liquidator. It had the same effect as the closing of the bank by the comptroller. Notice was then given to send in claims against the company. And the court in making that order had the right to fix any future time which it might think proper within which claims were to be presented. No affidavit to the claim was necessary. The creditor presented and filed the claim with the liquidator the same as creditors file their claims with the receiver, and it is the date when the claim is presented and filed under this order when, according to the court in this case, the amount due is fixed. All payments made prior to that time must be credited. And so in the case now on hearing, all payments made prior to the proving of the claim and filing it with the receiver must, according to this decision, be credited on the debt, and reduce the amount due.

The result, then, of the English cases, is a decision in the *Greenwood* vs. *Taylor* case, and by the lower court in Kellock's case, in favor of the claim made by the defendant on the appeal; of the upper court in Kellock's case in favor of the decision of Judge Sage throughout; and in *Mason* vs. *Boggs*, an expression of opinion without any decision.

We submit that the weight of authority in England is strongly against the claim of the complainant.

When we examine the decisions of the different courts of the United States, I think that we will find the result to be similar to that shown in the English courts.

In the case of *Amory* v. *Francis*, Administrator, 16 Mass. 309, the Court holds as follows:

"If the creditor of an insolvent estate has a mortgage as

security for his debt of less value than the amount of his debt, he can claim from the commissioners only for the difference between his debt and the value of the property mortgaged."

Judge Parker, on page 311, says:

"Were it otherwise, the equality intended to be produced by the Bankrupt Law would be grossly violated, and 'The rules were adopted in England on account of their reasonableness and because consistent with the nature of the contract,' and 'There seems to be no reason why the same rule should not be applied to the settlement of deceased insolvent debtors in this commonwealth, for the Statute which provides for a distribution of these among creditors requires an equal pro rata distribution, and it never could have been intended by the Legislature that a creditor having security should have an advantage beyond the actual value of the property mortgaged. If the creditor had taken possession of the mortgaged premises, and foreclosed the mortgage, he would have the right to consider the estate a payment *pro tanto* according to its value, and file his claim before the Commissioner for the balance, as it has been settled in several cases.'"

And in *Farnum, et al.*, vs. *Boutelle*, 54 Mass. (13 Mett.) 159, Chief Justice Shaw, on page 164, held:

"For if the mortgage remained in force at the time of the decease of the debtor, then it is very clear, as well upon principle as authority, that the creditors can not prove their debts without first waiving their mortgage, or in some mode applying the amount thereof to the reduction of the debt, and then proving only for the balance."

And in *Sohier* vs. *Loring, et al.*, 60 Mass. (6 Cush.) 537, it is held:

"The holder of a bill of exchange, no part of which has been paid, may prove it in full in insolvency against the estate of each party thereto, and receive a dividend from each upon his whole claim, provided he does not receive in all

more than the whole amount of the bill. But any proof sought to be made after he has been paid any part of his claim, can be only for the unpaid balance."

On page 548 the Court says:

"But there is a distinction in this case where a holder applies to prove his debt against one party after having received a part of it from another; and when he applies to prove before receiving any payment or composition from another party, or before a dividend has been declared in his favor under a commission against another party. Any sum actually received in payment from any party to a bill before proof made against another must be deducted from the amount to be proved against any other party."

And in a still later case in the same state, the *Merchants National Bank* vs. *Eastern Railroad Company*, 124 Mass., 524, decided in 1878, the court says:

"The certificate as a payment must, therefore, represent the actual debt reduced by the value of the collateral security. This result conforms to the rule of equality which the statute plainly recognizes as existing between all the creditors. It is supported by the consideration that it is the rule in bankruptcy, the rule applied in this commonwealth to the settlement of the insolvent estates of deceased persons; and the rule in equity which requires a creditor who has two funds for the payment of his debt as against the other creditors who have but one, to resort first to his own security, and permits him to claim against the common fund only to the extent that the security which he holds falls short."

It is claimed that the Massachusetts decisions here cited (and there are several others in the same State to the same effect) are based on the Bankrupt Law of that State, and that, therefore, they ought not to apply to a case in equity. Those decisions, however, are not in cases of bankruptcy at all. But they are based upon what the Court regards as equity as ap-

plied to the settlement of estates of deceased persons, and other insolvent estates not in bankruptcy. The Courts do hold that the provisions of the Bankrupt Law are in accordance with the intention of the act to distribute the assets of deceased insolvents ratably among all the creditors; and the same rule should apply to the Courts of the United States, for the Statutes of the United States have adopted the same provisions in the National Bankrupt Act as Massachusetts did in its State Bankrupt Act. The eminent Judges who delivered the opinions referred to believed that such decisions were in accordance with the rule for distribution of assets, to which we have referred, and their opinions upon that subject are entitled to weight in all courts.

In the case Wurtz vs. Hart, 13 Iowa, 515, the Supreme Court of Iowa held:

"A creditor under a general assignment who has special security may be required by the other creditors to resort to this, and can only claim a dividend upon the amount remaining unpaid after exhausting the property upon which he takes a special lien."

The counsel for the appellant refers to this case as being decided without much consideration; but it never has been departed from in a decision of that State, and in the recent case of Doolittle vs. Smith, decided by the Supreme Court of Iowa on January 21, 1898, was expressly affirmed (73 N. W. Rep., 867). In the latter case a creditor, after proving her claim against an assignee for the benefit of creditors, realized a large sum from her collaterals. The Court required her to credit the amount and received dividends on the balance only.

In *Midgeley* vs. *Slocum*, 32 Howard's Practice Rep., 423, it was held:

"Where a bank, a creditor holding notes belonging to

the class mentioned in the assignment to a large amount, which were secured in part by a pledge of notes by other parties, which other notes had been collected by the bank, held that the law applied these collections to the payment of the principal debt, so that the bank had ceased to be a holder of the notes thus paid, and was not entitled to a dividend on the basis of the original indebtedness."

And in Knowles, Petitioner, 13 R. I., 90, the Supreme Court of Rhode Island held:

"In Rhode Island a creditor who has a claim secured by a lien, is entitled to a dividend from the voluntary assignment of his debtor only on such residue of his claims as may remain unpaid after he has exhausted the property subject to the lien."

In this case the Court refers to the various decisions of the courts upon this question, and concludes by saying that it preferred the doctrine of the cases in which it has been decided as thus held by that court, and says, further:

"It also accords with the policy of our present Statute that creditors shall share equally in proportion to their respective demands in the assets of their debtor. We are of the opinion, therefore, that the proceeds of the mortgaged property are to be first applied to the payment of the notes, and the dividend paid upon the residue only."

It is true, as stated in the Brief of Appellee, that the same court in 15th R. I. has decided this question in a different way, and that, therefore, the Supreme Court of that State may be counted on both sides of the question. We give this decision simply as the argument of the Judges who composed the court at that time in favor of the doctrine which we claim is equitable.

In re Souther, 2 Low., 320, Justice Lowell says:

"The general rule undoubtedly is that the holder of a

note may prove against all the parties for the full amount, and receive dividends from all until he has obtained the whole of his debt with interest. It is likewise the general rule that what he has received from one party, or from dividends from one party in bankruptcy from the note, are payments which he must give credit for if he afterwards prove against others."

And, again, on page 321:

"The theory of this decision is that no creditor can prove for more than his actual debt as it exists at the time of the proof, without obtaining an undue advantage over other creditors."

In re Pulsifer, 14 Fed. Rep. 247, it is held:

"A creditor has no right to prove his debt and receive dividends on any more than the actual amount of the bankrupt's liability. So a bankrupt endorser is liable only for the balance due on notes endorsed by him after deducting the amount paid by the maker of the note."

And on page 249 the Court says:

"The same rule must apply in a case as would hold if a suit at law had been brought by the bank against the bankrupt as endorsers of his paper."

So in the present case, the Chemical National Bank has the right to prove for the exact sum, and no more, that it could have recovered judgment for in a suit at law brought by it against the Fidelity National Bank at the time when the offer to prove was made.

> See, also, ex parte Harris, et al., 14 Nat. Bk. Register, 422.

A very strong case is that of *The Third National Bank of Baltimore* vs. *Lanahan, Trustee, et al.*, decided January 5, 1887, and reported in 66 Md. 461 (7 Atlantic Rep. 615).

The syllabus is:

"Under an assignment for the benefit of creditors, the obligation of the Trustee to pay a debt owing by the assignor does not depend on the state of the account between the creditor and the assignor at the time of the assignment, but at the time when payment is made."

"Where at the time of the assignment a debt of the assignor is secured by collaterals and is subsequently partly paid to the creditor by moneys realized from the collaterals, before a dividend on the debtor's estate is made, such creditor is not entitled to a dividend on the full amount of the indebtedness, but only on that portion which remains after deducting the amount received from the collaterals."

The facts were, R. W. Raisin and W. L. Raisin, general partners as W. L. Raisin & Company, made a general assignment for the benefit of their creditors, both individual and partnership. The assignment embraced all the property of the firm, and all the separate property of each partner. The Third National Bank was a creditor of the firm. A portion of this indebtedness arose in this way: S. K. Cooper, known as a special partner of the firm, executed five promissory notes of $5,000.00 each, payable to the order of R. W. Raisin & Company. These notes were secured by the pledge of certain other notes belonging to the partnership and which were owned by its debtors. They were delivered to the bank together with the collateral security, and by it discounted after they had been endorsed in the firm name. * * * Before the filing of the claim it had collected a large sum from the collaterals pledged to secure the discounted notes.

Judge Bryan held:

"Where an assignment is made under a trust deed directing the trustees to pay all the creditors in full, if the assets are sufficient, and if not, then ratably and equally according

to their respective amounts, a creditor, being a bank with whom notes due the debtor were deposited as collateral to obtain advances on his notes, and which has largely realized on the collateral, can not claim a dividend on its whole debt without deducting the amount realized on the collaterals."

And, again:

"Before the filing of the claim, it (the bank) had collected a large sum from the collaterals pledged to secure the notes. It contends that it is entitled to a dividend on the full amount of the indebtedness, without deducting the sum received from the collaterals. * * * The trustee is required to pay all the partnership creditors in full, if the partnership assets are sufficient; and if not, then ratably and equally according to their respective accounts. It can not be denied that the sum received from the collaterals diminished the indebtedness of the partnership. We do not see how any question in respect to the marshaling of the assets can arise. It is simply a question where a portion of a debt is paid by property of the debtor pledged to secure its payment. It is not a question whether other creditors can compel the bank to seek payment from the collaterals before claiming distribution from the trust fund. The bank has actually received payment to a certain extent. The portion remaining unpaid is an ordinary debt reduced to judgment."

The counsel for appellee speak of this case as decided upon the peculiar terms of the trust deed made in that case. But those "peculiar terms," as they call them, were simply the same as the statutes regulating the distribution of the assets of insolvent National Banks apply to such assets. It was that they should be divided ratably and equally. No other condition applied to the mode of distribution, and so the assets of insolvent National Banks are to be distributed equally and ratably among the creditors. And the court, in deciding the case refers to the various decisions cited in the

present case, and gives its judgment as its conclusion from those decisions.

The same court in the recent case of Nat'l Union Bank of Maryland vs. Mechanics' Bank of Baltimore, 80 Md. 371, not only approve as "just and equitable" the rule that distribution should be made on the basis of the amount then due, but require the secured creditor to exhaust or deduct the value of his security before proving his claim. It was a case of an assignment for the benefit of creditors, and much stress is laid on the inconvenience of permitting the secured creditor to participate for the full amount of his claim in the assets and afterwards to collect the full amount of his collateral, with all the risk of his own insolvency when called upon by the assignee, from whom he has received dividends, to refund the excess above full payment.

Another strong authority is the case of Wheat vs. Dingle, 32 S. C. 473, decided April 10, 1890. The syllabus is as follows:

"Where lien creditors of an intestate receive part payments after his death from the proceeds of property mortgaged and pledged, they are entitled to dividends along with the unsecured creditors out of the general assets, but only upon the amount of their demands remaining unpaid after such application, and not upon the amount due at the date of the intestate's death."

After referring to the case of *Morton* vs. *Caldwell*, and stating the questions decided in that case, the Court says:

"This seems to us, considering the facts, strictly correct; but suppose the payments referred to instead of having been made by a third party had been out of the estate proper of the debtor himself, would it be for a moment contended that such payment did not release that much of the amount for which the deceased was originally liable to the creditor? It

seems to us that such result would not only be in violation of all principles but entirely unjust. * * * After the property mortgaged has been sold and applied to the debt, leaving a balance of the debt unpaid as to that balance, the creditor is no longer a mortgage creditor, but stands only where his evidence of indebtedness is, and he gets judgment for the balance alone on his claim whatever it may be from which has already been eliminated what was a mortgage debt."

This case most clearly disposes of the claim that the amount due at the intestate's death, or at the date of the assignment is the only amount upon which dividends must be paid, and that payments made after such dates can not be considered in distribution. This claim is the one which the counsel mainly argued as settled by the case of *Morton vs. Caldwell.*

A recent case in the same state, Ragsdale vs. The Winnsboro Bank, 45 S. C. 575, makes a distinction between payments from a principal's estate, after proof filed against both insolvent principal's and surety's estates, and payments from securities that came from the debtor's estate. The court approves the ruling in Wheat vs. Dingle, but shows the very just and equitable distinction between a rule that permits full dividends on the whole amount due when there are *two distinct debtors* (even though principal and surety) and a rule that permits such dividends when the creditor has received part payment out of the debtor's assets held by the creditor as security. The court say, p. 583 (italics ours): "We understand that the exceptions to so much of his Honor's decree as decided that creditors who hold collateral securities should be paid their *pro rata* dividend, regardless of the amounts they may have collected, or may yet collect, on said collaterals, has been abandoned. *This court, however, does not desire it to be understood that it assents to this rule of distribution.*"

The Supreme Court of Washington, on December 9, 1892, decided the case *in re Frash*, which is reported in 5 Wash. 344, and from which we make the following quotation:

"Section 8 of the Act provides that the assignee shall, from time to time, make full and equal dividends among the creditors of the assets in his hands in proportion to their claims, not a dividend in proportion to their claims, simply, but a full and equal dividend. It is for this purpose that the assets are marshaled and placed under the control of the Court, that if a creditor comes in to prove his claim he must come in upon equal footing with creditors of a like class. As we have before said, if a creditor were allowed payments on his whole original claim, he would have greater advantages than the original security contemplated, for as was well said in *Amory* vs. *Francis*, 16 Mass. 308, 'originally it would only have been security for a proportion of the debt equal to its value, whereas by proving the whole debt, and holding the pledge for the balance, it becomes a security for as much more than its value as is the dividend which may be received upon the whole debt.' We think that the plain and universally recognized principles of equity demand that the secured creditor must first exhaust his security, apply the proceeds to the diminution of his claim, and then share *pro rata* with other unsecured creditors on the balance of his claim. Such is the holding of the Iowa cases under a statute identical with ours. See *Wurtz* vs. *Hart*, 13 Iowa, 515. Such also is the holding of the courts of South Carolina, Louisiana, Vermont, Maryland, and Massachusetts. Some of the Massachusetts cases, but not all, are decided on the strength of their Statutes in Bankruptcy."

In many of the cases cited reference has been made to the Rule in Equity regulating the marshaling of securities. We quote this Rule as laid down in Story's Equity Jurisprudence, section 633:

"The general principle is that if one party has a lien on,

or interest in, two funds for a debt, and another party has a lien on, or interest in, one only of the funds for another debt, the latter has a right in equity to compel the former to resort to the other fund in the first instance for satisfaction if that course is necessary for the satisfaction of the claims of both parties, whenever it will not trench upon the right or operate to the prejudice of the party entitled to the double fund. Thus a mortgagee who has two funds as against the other specialty creditor who has but one fund, will in the case of the death of the mortgagor, and the administration of his assets be compelled to resort first to the mortgage security, and will be allowed to claim against the common fund only what the mortgage on a sale consented to by him is deficient to pay."

This most equitable rule is applicable to the facts of the present case, and gives to each class of creditors a fair and equal share of the assets of the insolvent estate.

In Bell v. Fleming's Executors, 1 Beasley 13, Chancellor Williamson approves the rule, as a general one in claims against insolvent estates, that the creditor should be first compelled to exhaust his security before being allowed to participate in dividends, and should draw dividends only on the balance due him. He bases the rule on the broad ground that equality is equity.

Willis v. Holland, 36 S. W. 329, was a case where an insolvent debtor had made a conveyance to a trustee in trust to pay certain of his debts. The Court says, p. 331, that such creditors have a right to have security held by one applied to his debt before he will be allowed to participate. It must be inferred that participation would be only upon the balance.

In Field's Ex'r. v. Creditors of Wheatley, 1 Snead 351, and Winton v. Eldridge, 3 Head 361, it is held that mortgage creditors of a decedent must first exhaust the mortgage,

and for balance share *pro rata* with other creditors in the personalty.

The same just principle of distribution is approved in two recent cases in Kansas.

The American National Bank v. Branch, 57 Kans. 27.
The Security Investment Co. v. Richmond National Bank, 58 Kans. 414.

In both cases the question arose under assignments for the benefit of creditors. In The American National Bank vs. Branch, 57 Kans. 27, the Court say, p. 35: "It would be inequitable to allow these claimants a *pro rata* dividend on the whole amount of their claims when payment of a part, if not all, of it may be received from the mortgage securities to which they have the exclusive right."

In The Security Investment Co. vs. The Richmond National Bank, 58 Kans. 414, the Court say, pp. 417, 418: "As the claimants held liens on property other than that assigned, they were not entitled to share equally in dividends with those who held no special security."

In Moore vs. Dunn's Adm'r, 92 N. C. 63, it is held that a mortgage creditor of a decedent must first exhaust his mortgage and look to the personalty for the residue. The case follows and approves Creecy vs. Pearce, 69 N. C. 67, where it is expressly held that the residue, after exhausting the mortgage, is to be paid ratably with other claims.

Some of the authorities do not require the creditor to exhaust his security before participating in dividends, but if he realizes anything from the securities it must be deducted from his claim whensoever received, and dividends paid only on the balance.

In Lowell vs. French, 54 Vt. 193, the creditor had proved for the full amount against the estate of both principal and

surety. A dividend having been afterwards paid from the principal's estate, the creditor was required to deduct it and share only upon the balance in the surety's estate. The Court say, p. 199 (italics ours): "In the distribution of an insolvent estate we see no reason why a payment made by the principal after the allowance should not be treated in the same way that it would have been if made before. In both cases the payment reduces the liability of the estate. While it is true that the payees had the right to regard the surety as a principal, and to enforce his liability as a principal until they had obtained full satisfaction, yet *where there is only a limited fund from which to obtain satisfaction, and the question is made how that fund shall be distributed, creditors whose claims are equal in right are entitled to share equally in such distribution.*"

The case of Bank vs. Alexander, 85 N. C. 352, is very similar to Lowell vs. French. It is not clear from the report whether a dividend was received from the principal's estate before proof against the surety's estate or before dividend. It was received after *insolvency* of both principal and indorser, and the Court required it to be deducted from the claim against the surety's estate.

Wheeler vs. Walton & Whann Co., 72 Fed. 966, was a decision by the Circuit Court of the United States for the District of Delaware. Judge Wales pronounced the opinion. It was a receivership case, which is virtually the same, as the court say, so far as the rule for application of collateral is concerned, as a case of assignment for the benefit of creditors. On page 967 Judge Wales says that by collecting the collateral notes before a dividend is made the creditor must credit the amount received and take a dividend on the balance only. The conflict of authorities is recognized, but in a note by the reporter it is said the court's attention was

not called to the case of Levy v. The Chicago National Bank, 158 Ill. 88, hereinafter cited.

In re Estate of McCune, 76 Mo. 200, the question arose in the administration of the assets of an insolvent decedent's estate. The language of their statute is, p. 206: "If there be not sufficient to pay the whole of any one class, such demands shall be paid in proportion to their amounts." Creditors had realized upon their collaterals *after proving* their claims, but *before distribution.* (P. 200.) The court held that conversion of the collaterals into cash operated as payment *pro tanto,* and that dividends should be made on the balance only, and say, p. 206: "Any other construction than this would clearly contravene the plain language and teachings of the statute and result in an inequality of distribution which the statute neither contemplates nor tolerates." On p. 207 the court suggests a query as to the rights of such creditors to participate if they had not collected their collaterals.

Philadelphia Warehouse Co. vs. Anniston Pipe Works, 106 Ala. 357, is a case where the assets of an insolvent corporation were in the hands of a receiver. After insolvency and appointment of the receiver, the Warehouse Co., a creditor, collected a large sum on its collaterals. Whether such collection was made before or after proving its claim is not clear from the statement of facts, but the court treat that fact as immaterial, and approve the rule that where collaterals are collected before dividend the dividend should be made only on the residue of the claim.

In the London and San Francisco Bank vs. Snell, Heitshu & Woodward Co. (U. S. Circuit Court for the District of Oregon), 83 Fed. 603, a receiver was appointed for the company upon the application of the bank, a creditor for a large amount, holding collaterals consisting of book accounts,

whose claim had been recognized by the Court by an order for payment of interest. Afterwards $7,000 was collected upon the book accounts. The Court intimates that the weight of authority, perhaps, does not make the amount due at time of distribution the basis for dividends, but adopts that rule for the reason that the bank had received interest.

Erle vs. Lane, 22 Colo. 273, is a recent, well-considered case, where, after proof against a decedent's estate, collateral was realized upon before distribution. The Court of Probate had permitted a dividend upon the original amount of the claim. This order was reversed. The Court distinguish between cases of assignment for the benefit of creditors and cases of decedent's estates (the statutes of Colorado making creditors in assignments *cestuis que trustent*). On page 279 the Court say, after stating that the creditor may prove for the full amount (italics ours): "Yet if, before or *after* the claim is proved, he disposes of the security and realizes thereby a partial payment of the claim, *he has derived all the benefit it was intended to give*, and all that, under his contract, he is entitled to receive, and it no longer exists for any purpose. In other words, if he disposes of his collateral and puts it out of his power to return it in case his debt is paid, it ceases to be collateral, *and the sum realized operates as a payment* and reduces his claim *pro tanto*. By his own voluntary act he parts with the double right the law gives him, and thereafter can proceed only for the remainder of his claim, and is entitled to dividends only on that amount."

Whittaker vs. Amwell National Bank, 52 N. J. Eq. 400, involves a large number of questions as to marshaling liens, one of which was the rights of general and secured creditors of one Jonathan Steward, who had assigned for the benefit of his creditors. It is a recent decision (1894) by Vice-Chancellor Bird. He says, p. 418: "Mr. Steward made assignment of certain securities which he held to different creditors

as collateral security for their claims. What are their rights as against the general creditors of Mr. Stewart? It is my judgment that they may file their claims with the assignee for the whole amount due them, without being compelled, in the first instance, to release their collaterals; but they are only entitled as against general creditors to a dividend out of the assets in the hands of the assignee upon the balance of their claim after having received the value of such collaterals."

The case of Thibaudeau vs. Benning, 20 S. C. Can. 110, came up on appeal from the Queen's Bench of Montreal, where it is reported in Montreal L. R., 5 Q. B. 425. It was a case under an assignment for the benefit of creditors and the question arose under the *common law*, as appears from Chief Justice Dorion's opinion in the Queen's Bench, p. 437. The Queen's Bench held, as expressed in the syllabus: "A creditor who holds notes or merchandise as collateral security is not entitled to be collocated upon the estate of his debtor in liquidation, under a voluntary assignment for the full amount of his claim, but is obliged to deduct any sums he may have received from other parties liable on such notes, or which he may have realized upon the goods; and it does not matter at what time such sums have been received on account, provided it is before the day appointed for the distribution of the assets of the estate on which the claim is made." The decision is based on the ground that sums realized upon the collateral operate as payment *pro tanto.* The Supreme Court affirmed the decision of the Queen's Bench.

In The State of Nebraska vs. Nebraska Savings Bank, 40 Neb. 342, the question arose on the distribution of the assets of an insolvent state bank. The court, after a full discussion of the question, in which they approve Amory vs. Francis and *In re* Frash, *supra,* hold that collaterals, realized upon before distribution, must be deducted and dividends

made only on the balance due, and that the creditor must surrender to the receiver the collaterals to be collected or disposed of as the court may order for the benefit of the creditor. There was no statute bearing on the subject. Referring to the contention that the creditor should be allowed to draw dividends on his full claim, the court say, p. 350: "The secured creditor would obtain an advantage over the unsecured one, to which no rule of law or equity entitles him, and which can not be accorded him without working injustice to other parties."

The following authorities hold that the creditor shall deduct from his claim the proceeds of any security realized before proving or sending in his claim to the official liquidator:

Furness vs. Union National Bank, 147 Ill. 570.
Levy vs. The Chicago National Bank, 158 Ill. 88.
In re Barned's Banking Co., 5 L. R. Chan. App. 18.
Fottrell vs. Kavanagh, 10 Irish Rep. Eq. S. 256.
Eastman vs. Bank of Montreal, 10 Ontario Rep. 79.
Cooper vs. Molson's Bank, 26 S. C. Can. 611.

In Furness vs. Union National Bank, the court say, p. 573: "The creditor has a right to prosecute his claim for the full amount against the estate of the deceased debtor in the hands of the administrator, as he had a right to prosecute it for the full amount against the debtor when alive. Of course, this right is subject to the condition that the whole amount of his claim is due to him when he files and proves it. If he has realized upon his collateral before filing and proving his claim, he voluntarily parts with the double right secured to him by the law, and can only proceed for what is actually due to him; that is to say, for what remains of his claim after deducting the amount realized from the collaterals."

In Levy vs. The Chicago National Bank, 158 Ill. 88, the

English and American authorities are reviewed, and the court expresses its conclusion as follows, p. 102: "Our conclusion is, that the amount upon which the secured creditor is entitled to receive dividends from the assets of the insolvent estate is the amount actually due to the creditor when he files his proof of claim or presents his claim under oath; that the subsequent hearing upon objections or exceptions should be directed to the inquiry as to what was due at that date; that the amount due at that date is to be ascertained by the deduction from the principal debt of all payments made before that date, whether realized from collaterals or otherwise, but that amounts realized from collaterals after that date are not to be deducted, subject always to the qualification that the dividends received from the general assets and the amounts realized from the collateral security shall not together exceed the amount due the creditor upon his claim." The court expressly dissent from the statement of the learned judge who delivered the opinion in the case at bar in the United States Circuit Court of Appeals, that there is no logical basis for any distinction between the effect of collections made from collaterals after insolvency and before filing proof, and of those made after filing proof. They show that in Illinois, at least, creditors have no such "fixed" equitable ownership in the assets as will prevent its yielding to a payment received by the creditor before he proves his claim.

The plan of proving a fictitious amount—the amount *formerly* due—in order to obtain a dividend large enough to pay what is *now* due may be logical, but it does not seem to be fair.

The English and Canadian cases cited show that this rule of distribution is well established in both England and Canada. That is to say, in both countries the creditor must *at least* credit the proceeds of collaterals received *before proving* his claim. In Canada, however, as appears from Thibaudeau vs. Benning, 20 S. C. Can. 110, the creditor must also deduct

all proceeds of collaterals received before *dividends*, prorating only on the balance. In England it seems to be settled by Kellock's Case, L. R. 3 Chan. App. 769, that proceeds of collaterals received after proof are not to be credited. The principal reason assigned is that the official liquidator might be tempted to delay dividends, hoping for the creditor to realize on his collaterals. We respectfully submit that this danger is not so imminent as the corresponding danger of *creditor* and *collateral debtor* agreeing to defer payment of collateral under the rule in Kellock's Case. The delay of the officer (liquidator or receiver) is *illegal*—a breach of his sworn duty. The delay of the others, creditor and collateral debtor, is but the legitimate adjustment of their private affairs so as to enable the creditor to reap the reward of a larger dividend offered by the law. He could well afford to be more lenient to the collateral debtor.

In re Barned's Banking Co., 5 L. R. Chan. App. 18, it is held that proceeds realized from collaterals before *formal proof* to the official liquidator must be deducted from the amount on which dividends are based, although *before the proceeds were realized* the claim had been sent by a notary public to the official liquidator for *payment*.

Let us now refer to the authorities cited by the counsel for appellee, and see how far they justify the claim made by them.

This question is touched upon in the case of *Lewis, Trustee*, vs. *United States*, 92 U. S. 618.

In that case there was no question of dividends. The United States was held to be entitled to be paid in full before other creditors were entitled to anything. And the court held that this rule applied to the estate of all the partners.

The Trustee denied this right, and this was the only question arising in the case. In deciding the case, however, Justice Swayne, on page 623, says:

"It is a settled principle of equity that a creditor holding collaterals is not required to apply them before enforcing his direct remedy against the debtor."

This is the general rule, but no such claim is made here. But the court does not hold that equitable considerations may not vary this rule. On the contrary, it considers the considerations urged for varying it in the case before the court, and argues that such considerations are all in favor of enforcing the rule. It is scarcely necessary to say that had the United States at that time been paid part of its claim by the sale of these collaterals, it could only have asked for the balance then due to it after crediting such payment.

In the case of *Moses* vs. *Administrators of Ranlet*, 2 N. H. 488, referred to in complainant's brief, Justice Redfield, in deciding the case on page 489, says:

"It is not pretended that any part of the sum allowed by these commissioners had previously been paid or released, and the only ground for its rejection seems to be the circumstance that the plaintiff has for such eventual payment collateral security. But in ordinary cases this circumstance is no objection to a suit and recovery of the whole claim, since the creditor can in no way obtain but one payment of his demand. Such it is admitted would be the case here if the debtor were alive. But the death of the debtor can not itself change the principle of justice, or the terms of the contract, and the Statute does not profess to make any change except to introduce an equal division between creditors of said estate, as belonged to the insolvent at his death."

We submit that if part of the sum allowed by the commissioners had been paid, as in the present case, the judg-

ment of the court would have been different. Also, if the death (in the present case the insolvency) of a debtor cannot in itself change the principles of justice so as to prevent the creditor suing for the full amount due him, neither can it permit him to prove a larger claim than he could sue for and recover if death or insolvency had not intervened.

In the case of *West* vs. *Bank of Rutland*, 19 Vt. 403, Justice Redfield, on page 409, says:

"It is true that if the securities had been converted into money, and it is between debtor and creditor, it ceases to be collateral, and operates directly as payment, so that the debt is thereby reduced, and the creditor can only sue for the balance."

And, again,

"In England and in this country in such case the court of chancery will oftentimes compel the party to apply the funds in his hands, and only proceed against the other funds for the balance, and if the funds are not money, will require them to be reduced to money, but in no case where it is merely collateral will a court of equity compel its application, unless the debtor stands in the relation of a co-surety."

The cases of *Finley* vs. *Hosmer*, 2 Conn. 350, and *Walker, Smith & Co.* vs. *Barker*, 26 Vt. 711, are similar as to the facts. In both cases the claims had been presented and allowed. The creditors held mortgage securities for their debts. They afterwards foreclosed their mortgages, in both cases the court held that they were entitled to dividends on their full claim; but, as will be seen, they had received nothing at the time their claims were presented and allowed.

In the case of *Allen* vs. *Danielson*, 15 R. I. 480, the court also held that the party was entitled to a full dividend upon his claim, without regard to the collaterals held by him. In this case the payment from the collaterals was not made until

after the second dividend had been declared. This case is in direct variance from a decision of the same court made a short time previous, and to which we have already referred.

Counsel for complainant cites also a number of cases decided by the Supreme Court of Pennsylvania.

The foundation case cited and followed is Miller's Appeal, 35 Pa. St. 481. After an assignment in trust for creditors, one of the creditors attached a legacy, which was left to the insolvent debtor after the assignment, and having applied it on his debt, was thereafter permitted to prove for the original amount of his claim. Mr. Justice Strong says, p. 483: "It is not as a creditor that he is entitled to a distributive share of the trust fund. His rights are those of an *owner* by virtue of the deed of assignment. The amount of the debt due to him is important only so far as it determines the extent of his ownership. The reduction of that debt, therefore, after the creation of the trust and after his ownership had become vested, it would seem, must be immaterial. If it be suggested that the whole debt due Miller might have been paid by the assignor after the assignment and before distribution, the answer is at hand: Miller's right to participate in the distribution at all is only a right in equity, it requires the aid of a chancellor, and that aid will not be given if the whole debt is paid."

That creditors have equitable rights in the trust fund, that they are in a sense *cestuis que trustent*, is clear. But that they are *owners*, with an ownership so fixed and absolute that it is entirely independent of the debt out of which their interest grows, unless the whole debt is extinguished, is not so clear. If "the amount of the debt due to him is important *only as it determines the extent of his ownership*," how can that debt have sufficient force and validity to be the foundation of an action to subject the legacy to its payment? If it is not *all* in full force and validity, how much of it is? Is it not clear

that if the legacy had been not more than sufficient to pay the whole debt, the creditor could have recovered the full legacy? If, however, the debt *is* in full force, how can the creditor retain his claim unimpaired and undiminished, and at the same time *own* some of his debtor's property? Does the law or equity transfer property from the debtor to the creditor without affecting the debt? Again, suppose that the assets in the hands of the assignee should be stolen or lost by a cyclone, upon what *owner* would the loss fall? Such loss would disappoint and injure the creditor, but would no more affect his claim than if the property were being transmitted by the debtor's own agent instead of through the agency of law.

We respectfully submit that the answer of the learned Justice to his own suggestion, about the effect of full payment of the debt on ownership, is not sufficient. It says, in effect, that although this doctrine leads to a logical absurdity, the chancellor can avoid the consequences. If the debt, as it is reduced by payment, is permitted to measure the right to dividends, there will be no absurd consequences to require the chancellor's intervention.

The difference between paying the creditor a dividend upon his *whole claim* when it has *all* been collected, and paying the same dividend when a *part* of the debt is in his own pocket, seems to be not a distinction in equity, but simply a difference in the *degree* of injustice to other creditors.

When it is once admitted, as it is in Pennsylvania, Assigned Estate of Wilhelm, 182 Pa. St. 281, that the principal debt is in part *extinguished* by the proceeds of collateral received by the creditor, the whole argument, based on the right of the creditor to follow the assets as he could have followed the debtor, is inapplicable, and the logical advocate of the collaterally secured creditor's right so to manipulate his

claim as to obtain dividends on the original amount is forced to resort to some technical theory which will give the creditor rights independently of the *debt.* The "fixed ownership" theory meets the situation. Any theory, which permits a creditor to obtain the full benefit of a whole claim when part of it is gone, seems utterly subversive of that nursery maxim of political economy, "You can not eat your cake and have it too."

Although this Pennsylvania doctrine has been repeatedly asserted by its courts, they have thrice failed to enforce the rigor of its logic.

In Sweatman's Appeal, 150 Pa. St. 369, a prospective landlord, at the request and for the accommodation of a prospective tenant, purchased a lot and erected a building for the tenant, under an agreement that the tenant should lease the premises for a term of years to compensate the landlord. The lease was executed, binding upon executors, administrators and assigns, with covenants to pay rent and to terminate the lease for breach of covenants or conditions, without release of damages for such breach. Prior to the termination of the lease the tenant made an assignment for the benefit of his creditors, and the assignee abandoned the premises. The landlord was permitted to prove a claim for damages for failure to compensate him for his investment. Here there was no breach of any agreement *at the time of the assignment.* If creditors at the time of the assignment have a fixed ownership it is difficult to see how the landlord had any standing as a creditor.

In the Assigned Estate of Wilhelm, 182 Pa. St. 281, above cited, as to the effect on the debt of realizing on collaterals, the chancellor did even more than was suggested he might do by Mr. Justice Strong, in Miller's Appeal. The Court would not permit the creditor, whose claim was partly

paid by collateral realized after the assignment, although the creditor even refused to apply the proceeds of the collateral on his claim, to claim *interest* against the estate, to which he would have been entitled but for the payment. A very just decision, but justice came from the chancellor and not from the "fixed ownership" doctrine.

In a case decided by the Pennsylvania Superior Court, composed of seven Judges, *In re* Wetzler's Estate, 3 Pa. Sup. Ct. 435, a creditor had obtained judgment against his debtor and levied execution on personal property, after which the debtor assigned for the benefit of his creditors. Before dividend the creditor realized part of his claim out of the sale on execution. With this in his pocket he asked for a dividend on his whole claim. The Court unanimously held that it should be deducted and his dividend paid only on the balance. The decision was based, not on the ground that the levy was a satisfaction *pro tanto*, but on the ground that the personal property levied upon did not pass to the assignee.

It seems that the Pennsylvania theory does not work smoothly in its practical application.

In favorable contrast with the case of Miller's Appeal is the case of Combs vs. Union Trust Co., 146 Ind. 688. There the creditor, after an assignment in Indiana, went into another State and collected part of his claim by attaching property, which, however, was owned by the debtor at the time of the assignment. The Indiana Court applied the proceeds, not on his claim, but on his *dividends* in the assignment case.

But if the Pennsylvania theory is correct as to an assignee in insolvency, it ought not to be applied to the receiver of a national bank and to the Comptroller of the Currency, who is required to make "a ratable dividend," and has not the power of a chancellor to neutralize the injustice of a logical theory.

Outside of Pennsylvania the authority for appellee's contention is meager.

In the case of Brown vs. Merchants' Bank, 79 N. C. 244, there was a claim against the estate of McMurray & Davis. It was claimed that payments made by the estate of Greer & Alexander, who were endorsers on the paper which was the foundation of the claim, should reduce the amount to be allowed. Two points appear from the opinion:

No payments were made from any source upon the debts provided for in the assignment of March 8, 1875 (that of Greer & Alexander), before the assignment of McMurray & Davis was made, and the dividend was made long afterwards. Second, the payments were made by the sureties and not by the principals.

In the case of *Kellogg* vs. *Miller*, 22 Oregon, 406, the claim was secured in part by mortgage; no payments had been made upon it. The Court held that it could not compel the creditor to foreclose the mortgage before receiving a dividend.

In Michigan two cases are cited.

In the case of *The Southern Michigan National Bank* vs. *Byles*, 67 Mich. 296, the claim was proven January 17, 1884, but the payments which it was attempting to have credited on the claim were made afterwards.

In the case of *Bank* vs. *Haug*, 82 Mich. 327, the debt was proven April 16, 1889; a dividend was declared June 26, 1889, and paid to all but the plaintiff in that case. The payment to the creditors was made December 2, 1889. On page 610 the court says:

"The question here presented is an interesting one. If it were new in this State much could be said, and many authorities cited in support of either position; but we think the

question is ruled by the case of *Southern Michigan National Bank* vs. *Byles*, 67 Mich. 296."

The case of *Morton* vs. *Caldwell*, 3 Strobh., Chy., 162, was itself a reversal of the decision of the lower court, and so far as the questions involved in the present discussion are concerned, is clearly reversed by the same court in a later case already cited in this brief. In that case, however, it was not a question of collection from collaterals, but as between the makers and endorser of a promissory note whether a collection from one would reduce the dividend from the other.

The case of *People* vs. *Remington*, 121 N. Y. 328, is also relied upon. In that case it was held that a creditor of an insolvent corporation whose assets were in the hands of a receiver, had a right to prove and have dividends upon his entire debt, irrespective of collateral security held by him.

It is claimed that in this case there had been payments made before the claim was proven. But this, we think, is not the case, for, on page 332, the court in stating the question involved, says it is

"Whether the receiver, as the personal representative of the insolvent, could reduce the claim of the creditor for the purposes of a dividend by compelling a deduction from the *amount of the proved debt* of the value of collateral securities or any proceeds thereof."

The inference from this language, we think, is clear that the proceeds referred to were collections after the debt was proven but before the dividend was declared, and in confirmation of this view, on page 336, the court states its conclusions thus:

"The creditor is entitled to prove against the estate *for what is due to him*, and to receive a dividend on that amount."

And on page 334 it says:

"Then on what principle can we hold that because the debtor becomes insolvent the contract with his creditor is changed, and that the creditor can not under those circumstances enforce his direct claim against the debtor until he has realized on his security?"

Will it be claimed that if the debtor had not become insolvent that the creditor could have sued upon his entire claim without crediting the collections made from collateral prior to bringing suit?

And also on page 335, after quoting the case of *Greenwood* vs. *Taylor*, the court says:

"In equity, however, a party may come in and prove without giving up or affecting his security, except so far as the amount of his debt may be diminished by what he may receive."

And in the report of the same case in 54 Hun., 511, the court says:

"It does not appear that any of the money received from the sale of the pledged property has been applied to the payment upon the debt, either by the agreement with the receiver or by any claim to that effect made by the bank alone."

This review of the various authorities in the courts of the United States, we think fully sustains the claim made by the receiver in the present case. Not a single case clearly holds that a creditor can prove a larger claim than is actually due to him when he presents it, except one or two of those in Pennsylvania; and they are based upon a legal claim arising out of the character of the deeds of assignment, which does not exist in the case of receivers of national banks.

And why should this not be so? Why should a creditor

be permitted to prove for a larger sum than is actually due to him at that time? Why should a different rule be established in cases of payments realized from collaterals and payments made from any other mode?

Equality among creditors is the general rule of distribution adopted as to the assets of all bankrupts. This rule is especially applied to a distribution of the assets of insolvent national banks. Why should the courts attempt to evade this rule in favor of a special creditor, as is attempted to be done in the present case? The sentiments expressed by the eminent judges who decided the cases already cited, and the universal provisions of the bankrupt laws both in England and in the United States indicate the views of jurists and legislators upon this subject; and agree in the position that equality among creditors requires that one party shall not be entitled to receive full dividends upon his entire claim and also the payments he may receive on it from securities held by him, whether such payments were received before or after the presentation of the claim, provided only that they were received after bankruptcy occurred. The principles adopted in the bankrupt laws should be adopted in all equitable proceedings as the proper rule. It is just and fair to all. It gives to the creditors holding securities the full benefit of that security and places them as to the portion not secured on a perfect equality with other unsecured creditors.

If in the opinion of this court the established rules of equity prevent it from applying the principles of the bankrupt laws in their entire extent by compelling creditors to exhaust their security first, and prove for the balance only, it can at least as in bankruptcy limit the dividends to the amount actually due when such dividends are declared, or if not that, then to the amount due when the claim is presented and proved.

As said before, the almost universal doctrine established by these cases sustains the decision of Judge Sage that all payments made prior to the proof of claim must be credited and reduce the amount to be allowed. But the majority of the cases go further and sustain the claim made by the receiver on his appeal. Payments made after the proof of claim and before the payment of a dividend to the creditors should have the same effect as if made before the claim was presented to the receiver. The same principle of equity, the same propriety to conform the distribution of the assets of insolvent national banks to the laws of the United States regulating bankrupt estates require that a creditor should receive dividends only upon the sum actually due to him. Such would be the rule applicable if the bank had not become insolvent. In that case at any time the claim would be the amount of the original indebtedness after deducting all payments made from that sum. And as creditors claim the same right that they would have if the bank had remained solvent, it is but just that they should submit to the same rule as to the amount due as would then apply. It is true that a creditor who holds collaterals may sue his debtor for the entire claim without reference to the collaterals, and although such collaterals may be more than sufficient to pay his debt, but it is equally true that the moment he receives a dollar from those collaterals he must credit it, and can then only sue for the balance remaining after such credit. There is no reason why the same rule should not apply after the debtor has become insolvent as before. At no time should he be permitted to receive a dividend upon more than is then actually due.

But this is not a new question to this honorable court. It was involved in a case of great importance where the interetss of the United States required the application of the

rule that dividends should be paid by the receiver of a national bank regardless of collateral realized upon after the insolvency of the bank. This plan of distribution was not suggested by counsel in the case, but the language of Mr. Justice Field indicates how the suggestion would have been treated if made.

Cook Co. National Bank vs. The United States, 107 U. S. 445.

So far as the case cited bears on the question, the facts are as follows: At the time of the suspension of The Cook County National Bank, January, 1875, the Treasury Department of the United States held $150,000, par value, of United States bonds belonging to the Bank *as security* for all public moneys therein deposited. These bonds were, after the receivership, duly sold for $174,544.52 by the Treasury Department, and after paying *in full* the amount on deposit with the Bank to the credit of the Treasurer of the United States, there remained a balance of $19,239.05. At the time of failure the Bank had on deposit, of postal funds, $24,900, and of money-order funds, $14,684, deposited by the Deputy-Postmaster of Chicago. The Treasury Department applied the balance, $19,329.05, ratably on these two funds, leaving a balance due from the receiver on account of the two funds of $20,344.95. The officers of the United States being in doubt whether the said balance was a preferred debt under the U. S. Statutes, the United States filed a bill in the Circuit Court of the United States for the Northern District of Illinois against the Bank and its receiver, asking for a decree directing the disposition of the funds of the Bank in the control of the Treasury Department for distribution. The defendants treated the bill as if filed to obtain a *priority* in the payment of the *balance* due for postal funds and money-order funds. A demurrer to the bill was overruled by the Circuit

Court and appeal was taken to the Supreme Court of the United States, where the demurrer was sustained and the cause remanded for a dismissal of the bill. While the only question expressly considered was the question of priority, yet the scope of the bill was large enough to authorize a decree for a dividend upon the original amount of the claim for postal and money-order funds, if the United States was entitled to that relief, but no such decree was entered. Mr. Justice Field says, p. 449 (italics ours) : "With these provisions for security against possible loss for moneys deposited, it would seem only equitable that the Government should call for such security, and, *if it prove insufficient*, take the position of other creditors, in the distribution of the assets of the bank *in case of its failure*."

The italicized words indicate pretty strongly that the learned Justice did not disapprove of the treasurer's act in first exhausting the security and paying one claim *in full*, thereby disabling it, even under the Pennsylvania theory, from participating in dividends, nor is there the slightest suggestion that the claim for postal and money-order funds should be recognized for dividends in any larger sum than the amount due after applying the balance of the proceeds of the security.

While it does not appear in the record what assets the receiver held or what dividends he paid, it does appear that if the officers of the Treasury Department had withheld the full security, as appellee in the case at bar desires to do, a dividend of only eleven percent on the entire claims, together with the proceeds of the security, would have paid all the claims of the United States in full.

Counsel for the Chemical National Bank object to crediting on its claim the amount paid on the collaterals for another reason. They claim that the collaterals were not the prop-

erty of the Fidelity National Bank, and that, therefore, that bank is not entitled to a credit from their proceeds.

In the first place the collaterals were sent to the Chemical National Bank by Mr. Harper, the Vice-President of the Fidelity, in the same letter in which he asked for the loan of three hundred thousand dollars, and were sent to the bank as collateral to that loan. The Chemical received them as the property of the Fidelity, and treated them as its property. It credited the amount collected to it, and confessedly had no knowledge or suspicion that they belonged to any one except the Fidelity Bank. It does not pretend that any one at that time, or since, claimed any interest in those collaterals; and as against the Fidelity National, it has no right to deny the ownership of the latter any more than a lessee has the right to deny the ownership of the lessor in the property leased. It can only account for the collaterals to the party from whom it received them. And having received them from the Fidelity, it is under a legal obligation to account for them to it, and on the loan as collateral for which it received them.

Had a third party pledged these collaterals with the Chemical as security for the loan to the Fidelity, then ordinarily the claim made would be correct. The reason of the rule is that payments made under such circumstances not being made by the principal debtor, it is no payment of his indebtedness, and it is, therefore, immaterial to him whether the entire indebtedness is proved by the original creditor, or part by him and the balance by the surety who has made the payment. But this only applies to the case where the apparent debtor is in reality the principal debtor; not to a case where such debtor is a surety merely for the third party who made the payment; or when the circumstances of the case entitle him as between such principal and the party mak-

ing the payment to call on the latter to pay the debt. The doctrine is clearly stated in a case already cited,

In re Southier, 2 Lowell, 320.

In that case Justice Lowell reviews the authorities on that question, and in conclusion says :

"The better opinion at common law is that a payment made by a drawer or endorser does not exonerate the acceptor or maker unless the promise of the latter was made for the accommodation of the former, or there is some other equity which makes the note or bill the debt of the party who has made the payment."

This statement of the case is so in accordance with justice and the established principles of equity that we do not deem it necessary to cite further authorities. The reason of the rule referred to is that the party paying could in the one case prove a claim for the sum paid by him if the credit was allowed on the original debt. If this could not be done the reason of the rule wholly fails.

In the case at bar the money was borrowed by E. L. Harper in the name of the bank, but for his own use without any authority from or knowledge of the other officers of the bank, and by the perpetration of a fraud upon the bank, and the proceeds of the loan were immediately placed to his individual credit, and drawn out for his own use. It must be perfectly clear that if Harper had paid this debt, or any part of it, he could not have proved the sum so paid as a claim against the Fidelity National Bank; and the same rule applies to collaterals furnished by him either belonging to or controlled by him.

It is immaterial that this relation of the parties and the fraud perpetrated by him were not known to the complainant. In the case cited, the party making the payment appeared

to be the endorser, and it is not shown that any different relation was known to the holder of the paper. Yet it was permitted to be shown that although apparently an endorser, he was the party who should have paid the entire debt. And by the Statutes of Ohio in a suit on a promissory note against makers and endorsers, the law permits either party to offer evidence as to the real character of their obligation, and to have the judgment entered as surety against the one who in reality is surety, whether he appears in that relation on the paper or not.

Again, in the present case, the complainant supposed that these collaterals did belong to the Fidelity National Bank. This would naturally have been inferred by the complainant from the manner in which it obtained possession of them; the manner in which they were sent to it. The Chemical National Bank can not therefore complain if the same result should follow as would have followed had they actually belonged to the Fidelity Bank.

But what right has the appellant to make such a claim? It received the paper from the Fidelity National Bank, and has collected on it the sum of seventy-five thousand dollars, which it credited to that bank on account of the loan made by it, and no party has at any time made any complaint of this credit or contested the right of the Chemical bank to hold the money. It has seventy-five thousand dollars collected on account of this loan, and no harm is done to it by compelling it to credit it on that account so as to reduce the sum due to it.

III.

We maintain that the Chemical National Bank, in addition to the amount actually realized from collaterals, should be charged with the sum of $25,000, as of date June 28, 1887, on account of its negligent failure to present the Wilshire-Lewis note for payment on that date.

As to this fourth note, and which was the one matured first, June 28, the Chemical National Bank was the agent of the Fidelity to collect it, and if not paid at maturity to take the proper steps to fix the liability of the endorser on the paper.

It can not excuse its negligence to its principal by the claim that possibly if the note had been duly presented Lewis might not have paid it, and possibly if after the suit had been brought upon it a valid defense might have been made by the parties. The three notes which were duly presented for payment were promptly paid at maturity. And we have the right to presume that the other would also have been paid if the same course had been adopted. If the Fidelity Bank was interested in the payment of the other note, it had the right to be placed by its agent in the position which would entitle it to present and enforce its claim by suit. But by the negligence of its agent it can not make any claim against Lewis upon this note. The Chemical National Bank can not excuse its negligence by any such pretext as is made in this case.

But was the appellant guilty of negligence? The note was dated at Cincinnati, and was payable in bank at that place.

It seems hardly necessary to refer to authorities upon

this question. The duty of the Chemical Bank is thus stated by Daniels on Negotiable Instruments, section 327:

"It is the duty of the Bank, as soon as the bill, note, or check is placed in its hands for collection, to take appropriate steps necessary to its prompt payment or prompt acceptance, by making presentment for acceptance without delay, and presentment for payment at maturity. And if the instrument be not duly accepted or paid, the bank must take all necessary steps to fix the liability of the drawer, if it be a foreign bill, by placing it in the hands of a notary for protest, and by giving due notice of its dishonor to the party who endorsed the instrument to it for collection, whether it be a bill or note, inland or foreign. If the bank fail in any of these duties, it becomes immediately liable in damages to the holder."

This paper was left with the Chemical National Bank. It was its duty to present it for payment at the place where it was payable, and if not paid, to have the endorser properly notified so as to fix his liability. It did not do this; but retained the paper in New York until the day when it was due.

By this negligence, all of which is shown by the testimony of William J. Quinlan, the cashier of the Chemical Bank (Rec., p. 41), the sum of $25,000, which might have been realized out of the paper belonging to Harper, the real debtor, was lost.

The pretended excuse for not presenting the note for payment at Cincinnati, where Wilshire, the maker, lived, was the telegram of May 19, "Will want all returned here without presenting, as we advised parties to arrange payment here;" and the letter confirming this, which says, "Please do not present any of the collateral paper for payment. We have advised parties we would order back and charge up here." The paper in question was not payable in New York,

but in Cincinnati, and was not, therefore, covered by the direction not to present. But the directions were, "we want all returned without presenting," and "we have advised parties we would order back." The only authority contained in these letters was to return the paper to Cincinnati. The Chemical was authorized to return this note to the Fidelity Bank, if the latter had not failed. But it did not authorize it to retain the paper in New York and take no steps to charge the endorser with liability.

If the Fidelity did not order the paper back, it was the duty of the Chemical to send it to a proper collecting bank for presentment for payment. This it did not do.

But the Fidelity National Bank failed on June 21, 1887, and the Chemical knew it. Mr. Quinlan testifies that he knew that the Fidelity was in the hands of the Receiver on the 21st of June. Indeed, on the 18th of June the Chemical Bank was garnisheed by the Bank of Montreal in an action brought by it in New York against the Fidelity Bank.

The authority, if there was any, to return the collateral paper to the Fidelity Bank was abrogated by the failure of the bank and the appointment of a receiver. This very authority to return the paper to Cincinnati was coupled with the promise to send other paper in its place. And it was argued by counsel that the Chemical Bank was under no obligation to return the paper until the paper to replace it was sent. But the Chemical Bank knew that the receiver had no authority to substitute other paper for this collateral paper, and hence that that condition could not be complied with. The Chemical Bank, then, neither made proper efforts to charge the endorser, by having the paper presented for payment, nor did it return it to the Fidelity. So that in no view of the case can it escape the charge of gross negligence in this matter. Being guilty of negligence, its liability is

stated by Daniels on Negotiable Instruments, section 329, to be, "That loss is *prima facie* the amount of the bill or note placed in its or his hands."

This liability is in favor of its principal from whom it received the paper.

IV.

At the time of the rejection of the claim of the Chemical National Bank by David Armstrong, Receiver of the Fidelity National Bank, April 25, 1890, he made an offer to accept proof of a claim for $200,000, part of the amount claimed by the Chemical Bank, with a provision for abiding the result of judicial action as to the residue of the claim (Rec., p. 81 and p. 89, Armstrong Exhibit No. 3).

Had the Chemical Bank accepted the offer it would have received dividends on $200,000 and not waived any of its rights as to the residue of the claim. Ordinarily when a claim is rejected, and it is subsequently allowed by a Court, interest is allowed on dividends the claimant should have received from the time they should have been paid. The object is to place all creditors on an equal footing.

Armstrong vs. American Exchange Bank, 133 U. S. 433.

But the offer to pay a part ought, in equity, to stop interest *pro tanto*.

No right of the Chemical Bank was to be affected by the acceptance of the receiver's offer.

The counsel for appellant claims that under the offer of the receiver, the Chemical "must waive so much of the decision of the Court below as was in its favor, and consent beforehand to settle as if the receiver had succeeded *in toto*."

But this is not a fair construction of the receiver's offer, nor was any such claim intended. The offer was to pay dividends on $200,000 at that time; the balance was to be de-

termined by the decision of the Court upon the questions at issue.

The claim that all sums thereafter received from collaterals should be applied to reduce the amount of said claim, was only to take effect in case the Court held that the receiver had that right. The Chemical chose to accept nothing, but to bring suit for the full amount. It made no answer to this offer. It did not attempt to remove any obscurity which it might claim existed in the language used by the receiver.

Nor does the fact that the receiver subsequently contested the whole claim, as he was in duty bound to do, seem to us to justify a judgment for interest on such dividends as he offered to allow. The complainant preferred to put the whole claim in litigation. If the litigation has been retarded by the contest of the *whole claim* more than it would have been by litigating the matters proposed to be litigated by the receiver in his offer, the extra delay is directly chargeable to complainant's refusal of the offer. If the litigation has *not* been prolonged to any extra degree by a contest of the whole claim, then the receiver is not responsible for any delay by denying the validity of the entire claim. The Circuit Court assessed a large amount of interest against the receiver for the sole reason that he contested the whole claim instead of such portion as he originally refused to allow. We respectfully submit that it was error to do so.

On the whole case we claim that the judgment of the Circuit Court of Appeals should be reversed and the bill of the complainant dismissed.

Respectfully submitted,

JOHN W. HERRON,
FRANCIS F. OLDHAM,
Counsel.

February 9, 1899.